85-440

Supreme Court, U.S.
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No. 85-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985
Philadelphia Electric Company
Intervenors-Petitioner,
vs.
Exxon Corporation,
Defendant-Respondent,
and
United States of America,
Plaintiff-Respondent.

INTERVENOR PHILADELPHIA ELECTRIC COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a public utility which was directly injured by an oil producers overcharges is entitled to a hearing, to present evidence, or to be heard in any other manner in regard to the distribution of restitution funds ordered by a District Court to be paid by that producer.

2. Whether the District Court violated Petitioner's Fifth Amendment due process right by taking restitution funds in which Petitioner had a claim without just compensation.

3. Whether the District Court violated its equitable and statutory duties to ascertain the victims of a crude oil overcharge and to restore them to the position they would have occupied but for the illegal conduct by ordering that the restitution funds be distributed to the State governments for use in programs designed to aid a small segment of the population.

PARTIES TO THE PROCEEDINGS

The following is the list of the parties to the proceedings below in the Temporary Emergency Court of Appeals of the United States, as required by Supreme Court Rule 21.1(b).

THE UNITED STATES OF AMERICA,

THE STATE OF ALABAMA,

THE STATE OF ARKANSAS,

THE STATE OF CALIFORNIA,

THE STATE OF CONNECTICUT,

THE STATE OF DELAWARE,

THE STATE OF IDAHO,

THE STATE OF ILLINOIS,

THE STATE OF INDIANA,

THE STATE OF IOWA,

THE STATE OF IOWA,

THE STATE OF HAWAII,

THE STATE OF KANSAS,

THE STATE OF LOUISIANA,

THE STATE OF MARYLAND,

THE STATE OF MICHIGAN,

THE STATE OF MISSISSIPPI,

THE STATE OF MONTANA,

THE STATE OF NEVADA,

THE STATE OF NORTH DAKOTA,

THE STATE OF OHIO,

THE STATE OF OREGON,

THE COMMONWEALTH OF PENNSYLVANIA,

THE STATE OF RHODE ISLAND,

THE STATE OF TEXAS,

THE STATE OF VERMONT,

THE STATE OF WEST VIRGINIA,

THE STATE OF WISCONSIN,

THE STATE OF WYOMING,

THE TERRITORY OF GUAM,

THE TERRITORY OF THE VIRGIN ISLANDS,

EXXON CORPORATION,

NATIONAL OIL JOBBERS COUNCIL and the JOBBERS GROUP,

GLADIEUX REFINERY, INC.,

U.S. OIL AND REFINING COMPANY,

THE INDICATED REFINERS:

Champlin Petroleum Company, Ashland Oil, Inc., Tenneco Oil Company, American Independent Refiners Association, Pennzoil Company, and Texas City Refining, Inc.,

THE INDEPENDENT GASOLINE RETAILERS:

Luther Griffin, t/a Palmer Highway Exxon,
Edward McGovern, t/a Maple Avenue Exxon,
Anthony Monaco, t/a Milltown Exxon Service-center, Inc.,
Donald E. Skilling, t/a Edon Service Corp.,
Tex Shipley, t/a Shipley's Standard Service,

TOSCO CORPORATION,

PHILADELPHIA ELECTRIC COMPANY,

AIR TRANSPORT ASSOCIATION OF AMERICA,

GERALDINE H. SWEENEY,

NATIONAL FREIGHT, INC.,

RJG CAB INC.,

MARATHON PETROLEUM COMPANY,

MURPHY OIL CORPORATION,

MOBIL OIL CORPORATION.

There are no parent companies or subsidiaries of Philadelphia Electric Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	6
A. This Court Should Grant The Petition For A Writ of Certiorari To Prevent The Denial Of PECO's Constitutional Rights	8
B. The Courts Below Committed Errors of Law by Failing to Carry Out Their Restitutionary Duties Which Should Be Corrected By This Court	10
C. The Majority Decision In The Court Below Is In Conflict With Other TECA Decisions On The Same Issue. These Conflicting Decisions Should Be Resolved by This Court	11
D. The District Court's Departure From The Accepted And Usual Course Of Judicial Proceedings Requires That The Petition For A Writ of Certiorari Be Granted	13
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
Armstrong v. Manzo, 380 U.S. 545 (1965)	9
Blanchette v. Connecticut General Ins. Co., 419 U.S. 102 (1974)	9
Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F. 2d 717 (TECA) *cert. denied*, 459 U.S. 877 (1982)	10, 12
Dames & Moore v. Regan, 453 U.S. 654 (1981)	9
Department of Energy v. Hunt, et al., 734 F. 2d 816 (TECA 1984)	7, 10
DeRieux v. Five Smiths, Inc., 499 F. 2d 1321 (TECA), *cert. denied*, 419 U.S. 896 (1974)	12
Diamond Shamrock Refining Co. v. Standard Oil Co., et al., No. CS-84-1432 (S.D. Ohio)	7
Federal Power Comm'n. v. Interstate Natural Gas Co., 336 U.S. 577 (1949)	10
In re Alfred B. Alkek, et al., 9 DOE ¶82,521 (1982)	7
In re Cities Service Oil and Gas Corp., Case No. HRO-0285 (OHA)	7
In re DOE/Stripper Well Exemption Litigation, 578 F. Supp. 586 (D. Kan. 1983)	7, 10, 12, 13
In re ERA/Getty Oil Co., Case No. HRR-0074 (OHA)	7
In re Folding Carton Antitrust Litigation, 1984-2 Trade Cas. ¶66,189 (7th Cir. 1984)	8
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	8
Matthews v. Eldridge, 424 U.S. 319 (1976)	9

TABLE OF AUTHORITIES—(*Continued*)

Cases:	Page
Middlewest Motor Freight Bureau v. United States, 433 F. 2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971)	7, 12
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	8
Porter v. Warner Holding Co., 328 U.S. 395 (1946)	10
State of Tennessee v. Dole, 749 F. 2d 331 (6th Cir. 1984)	9, 12
United States v. Exxon Corp., 561 F. Supp. 816 (D.D.C. 1983), *aff'd* 4 Energy Mgmt. (CCH) ¶26,539 (TECA 1985)	2
United States v. Getty Oil Co., No. 77-434 (D. Del.)	7
United States v. Lieb, 462 F.2d 1161 (TECA 1972)	12
United States v. Sutton, et al., *appeal pending* Nos. 10-57, 10-58 (TECA)	7
United States v. Pro Football, Inc., 514 F. 2d 1396 (TECA 1975)	12
University of Southern California v. Cost of Living Council, 472 F.2d 1065 (TECA 1972), *cert. denied*, 410 U.S. 928 (1973)	12
Van Gemert v. Boeing Co., 739 F. 2d 730 (2d Cir. 1984)	8
CONSTITUTION	
U.S. Const., Amend. V	2, 4, 7
U.S. Const., Amend. XIV	7

TABLE OF AUTHORITIES—(*Continued*)

Page

STATUTES

Further Continuing Appropriation Act, 1983, Section 155, Pub. L. No. 97-377, 96 Stat. 1919 (1982) 6

Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796, *as amended* by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743..... 2, 3, 6, 7

Emergency Petroleum Allocations Act of 1973, Section 5(a)(1), Pub. L. No. 93-159, 87 Stat. 627. 2

12 U.S.C. §1904 Note (1976)..... 2-4, 6

42 U.S.C. §6321..... 6

42 U.S.C. §6371..... 6

42 U.S.C. §6863(a) 6

42 U.S.C. §7001..... 6

42 U.S.C. §8621..... 6

RULES

Supreme Court Rule 17.1(a)..... 6, 9

Supreme Court Rule 21.1(b)..... i

Federal Rule of Civil Procedure 24(a)..... 3, 5, 7, 9

MISCELLANEOUS

OHA Report, June 1985, NOJC App. C. at A-381-382..... 13

No. 85-

IN THE

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October Term, 1985

UNITED STATES OF AMERICA,

Plaintiff

v.

EXXON CORPORATION,

Defendant

INTERVENOR PHILADELPHIA ELECTRIC COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Philadelphia Electric Company ("PECO") hereby petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States, certiorari to be limited to the issue of the proper distribution of the overcharges for which Exxon Corporation ("Exxon") was held liable and the procedures followed in connection with such distribution.

OPINIONS BELOW

The Opinion of the Temporary Emergency Court of Appeals of the United States ("TECA") is not officially reported. It appears at 4 Energy Mgmt. (CCH) ¶26,539. It is set forth in full as is the dissent of Judge Becker in the Appendix submitted with the Petition for Writ of Certiorari filed by the National Oil Jobbers' Counsel, *et al.* in the instant proceeding ("NOJC App.") as App. A, at A-1, *et seq.* The Opinion and Order of the United States District Court for the District of Columbia in *United States v. Exxon Corp.*, is reported at 561 F. Supp. 816 (D.D.C. 1983); and appears at NOJC App., as App. C at A-191.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 1, 1985. A timely Petition for Rehearing was denied on August 15, 1985. (NOJC App. B at A-187). This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796 as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748 (previously codified at 12 U.S.C. §1904 Note (1976)), as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Section 209, the Economic Stabilization Act of 1970 as amended (previously codified at 12 U.S.C. §1904 Note (1976)):

> "Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation."

STATEMENT OF THE CASE

This case involves the disposition by the District Court of approximately $2 billion in restitution funds pursuant to a judgment under Section 209 of the Economic Stabilization Act, 12 U.S.C. §1904 Note (1976). Although the District Court permitted Petitioner Philadelphia Electric Company to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure, it did not provide PECO or any of the other purchaser-intervenors[1] who were the victims of the overcharge, any

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1. In addition to Philadelphia Electric Company, numerous other purchasers of oil and oil products were permitted to intervene under Federal Rule of Civil Procedure 24(a), including truck operators, taxicab operators, gasoline retailers, oil jobbers, airlines and oil refiners. *See* NOJC App. at 290 *et seq.*. PECO understands that

opportunity to present evidence or to be heard on the merits of their claim to a portion of the restitution fund.

Instead, without hearing a scintilla of evidence from the injured purchasers on the remedial issues, the district court *sua sponte* determined that the entire overcharge fund should be paid to the United States Treasury and distributed to the State governments for use in five programs designed primarily to aid recipients of aid for families with dependent children and food stamps. The district court's diversion of these restitution funds from the overcharged purchasers to a small segment of the population was a violation of PECO's Fifth Amendment due process rights and a violation of the court's equitable and statutory duties. *See* 12 U.S.C. §1904 Note (1976).

This action was commenced by the Department of Energy against Exxon for violation of crude oil regulations in connection with Exxon's massive miscertification over a six year period of lower priced "old oil" as higher priced "new oil" from its "Hawkins Field" Unit. On cross motions for summary judgment, the District Court held that Exxon had violated the regulations and was liable for the overcharges plus interest in the amount of $1,635,604,638.10. Exxon has filed a motion with this Court requesting leave to file a Petition for a Writ of Certiorari not to exceed forty five pages. PECO does not seek review of the liability portion of the Court's judgment.

In its Motion to Intervene, its Notice of Appeal, its brief in TECA and its Petition for Rehearing in TECA, PECO urged that it be provided an opportunity to be heard on its claim that as a direct purchaser of oil from refiners it was injured by Exxon's unlawful overcharges.

NOTES *(Continued)*

Petitions for a Writ of Certiorari are being filed by the intervenor refiners, jointly by the oil jobbers, gasoline retailers and airlines and jointly by the truck and taxicab operators and motorists.

On at least three separate occasions, parties sought to address the "remedy" issue (the disposition of any amount ordered to be refunded by Exxon) in the District Court. Each time, the District Court expressly "deferred" consideration of the remedial issues. For example, when various independent refiners sought to intervene, claiming they were injured by Exxon's overcharges, Exxon filed a Motion for a Stay which the District Court granted holding that "[t]here shall be no filing of briefs *amicus curiae* or responses thereto by the potential intervenors or the parties, respectively, *concerning remedial issues* until further order of this Court." Order, December 15, 1982 (emphasis added), NOJC App. D at A-288. Later, in January 1983, when the Independent Gasoline Retailers moved to intervene to assert a claim to their portion of the overcharge fund and Exxon again moved to stay any briefing on the remedial issue, the Court granted Exxon's Motion and deferred hearing the remedial issue.

On March 25, 1983, while all the potential intervenors were awaiting their opportunity to present their claims, the District Court declared Exxon liable for the overcharges *and* decided the remedy issue thereby denying those who were injured all right to be heard and to present evidence. The method of distribution selected by the Court—payment to the States for use in five limited programs—was not proposed by any party to the case. Thereafter, and prior to entering final judgment, the District Court permitted purchasers of oil to intervene finding "that the applicants for intervention are entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2)." Order, April 29, 1983, NOJC App. D at A-291.

Although recognizing that the intervenor-purchasers had claims to a portion of the fund "as a matter of right" the District Court refused to permit any hearing on the remedial issue. The District Court adopted a distribution plan which provides that the overcharge be distributed in accordance with five federal programs under which Congress appropriated $200 million to the States.

Section 155 of The Continuing Appropriation Act of 1982, Pub. L. No. 97-377, 96 Stat. 1830 (1982) commonly known as the "Warner Amendment." These programs provide for:

> (a) Low income home energy assistance, *i.e.*, grants to the poor to assist in the payment of home heating and utility bills; 42 U.S.C. §8621;
>
> (b) grants by the States for "weatherization of dwelling units . . . occupied by low income families", 42 U.S.C. §6863(a);
>
> (c) state development of conservation plans, 42 U.S.C. §6321;
>
> (d) funding for planning and implementing energy conservation measures for schools and hospitals, 42 U.S.C. §6371; and
>
> (e) funding of State educational services regarding conservation activities 42 U.S.C., §7001

On appeal, a divided panel of the Temporary Emergency Court of Appeals affirmed the District Court's remedy decisions on July 1, 1985. Judge William H. Becker's eighty-one page dissent was devoted exclusively to the issue of the proper distribution of the restitution fund and procedures to be followed in connection therewith. Timely petitions for rehearing were denied on August 15, 1985. (NOJC App. B at A-187).

ARGUMENT

The Writ of Certiorari should be granted in this case to prevent the denial of PECO's right to a hearing, and thus to due process, under the Fifth Amendment, to correct serious errors of law which, because of the importance of this case, will be of precedential significance in scores of cases, to resolve the conflicting decisions of the Temporary Emergency Court of Appeals concerning the

government's duties in connection with restitution funds under Section 209 of the Economic Stabilization Act, 42 U.S.C. §1904 Note (1976), to resolve the conflicting decisions between different Courts of Appeals concerning the disposition of restitution funds, and, finally, and perhaps most importantly, to permit this Court to correct the District Court's serious departure from "the accepted and usual course of judicial proceedings." Sup. Ct. R. 17.1(a).

The proper distribution of restitution funds, and the procedures to be employed in connection therewith, are vital questions involving not less than 5.5 billion dollars in this and other pending crude oil overcharge proceedings.[2] These issues have arisen, and will arise, with regularity in a variety of cases.[3]

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2. This case involves nearly $2 billion in overcharges. The *DOE/Stripper Well Exemption Litigation*, MDL 378 (D. Kan.) involves another $1 billion in crude oil overcharges. Pending in the Office of Hearings and Appeals of the Department of Energy are proceedings involving another $3 billion. *See, e.g., In re Adams Resources and Energy, Inc., et al.*, 9 DOE ¶82,553 (1982); *In re Standard Oil Co. (Amoco)*, 10 DOE ¶85,048 (1982); *In re Alfred B. Alkek, et al.*, 9 DOE ¶82,521 (1982); *In re ERA/Getty Oil Co.*, Case No. HRR-0074; *In re Cities Service Oil and Gas Corp.*, Case No. HRO-0285; *In re Remedial Order to Texaco, Inc.*, Case No. DRO-0199. Various crude oil cases are pending in the federal courts involving several hundred millions of dollars. *See, e.g., Department of Energy v. Hunt, et al.*, 734 F.2d 816 (TECA 1984); *United States v. Sutton, et al., appeal pending* Nos. 10-57, 10-58 (TECA); *Diamond Shamrock Refining Co. v. Standard Oil Co., et al.*, No. CS-84-1432 (S.D. Ohio); *United States v. Getty Oil Co.*, No. 77-434 (D. Del.). The issue of the proper disposition of these funds will have a profound economic affect on oil burning utilities, refiners, oil jobbers, truck operators, governmental units and others.

3. The right of overcharged purchasers to restitution, and the procedural rights attendant thereto, are vital issues in a broad spectrum of cases in addition to the many crude oil overcharge cases cited above. For example, these issues arise in rate cases, *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970) *cert. denied*, 402 U.S. 999 (1971) (restitution ordered to injured rate payers); and in class action antitrust and securities cases

The decision of the Court below is being cited as controlling in other proceedings by those who would prevent injured purchasers of oil from presenting their claims for compensation and divert restitutionary funds to state or federal governments for expenditures which bear no relationship to the injuries caused by the overcharges.

A. This Court Should Grant The Petition For A Writ Of Certiorari To Prevent The Denial Of PECO's Constitutional Rights.

As concisely stated by Judge William H. Becker in his detailed dissent in the instant case, "[t]he right to recover monetary and other damages caused by a violation of law . . . is a property right protected by the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States." NOJC App. at A-130.

Indeed, this Court held, as recently as 1982, that the right to seek monetary relief in the courts, similar to the restitutionary claims of PECO in this case, is a property right entitled to the protections afforded under the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). *Accord, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

PECO purchased significant quantities of oil subject to the overcharges by Exxon. PECO was permitted to intervene in these proceedings as a matter of right under

NOTES *(Continued)*

payers); and in class action antitrust and securities cases where settlement funds are not exhausted by an initial distribution, *In re Folding Carton Antitrust Litigation*, 1984-2 Trade Cas. ¶66,189 (7th Cir. 1984) (Court ordered fund paid to United States Treasury and permitted injured class members to file claims); *Van Gemert v. Boeing Co.*, 739 F.2d 730 (2d Cir. 1984). (Unclaimed portion of fund returned to the defendant after proceedings before a Special Master).

Fed. R. Civ. P. 24(a) in order to assert its direct and substantial claim to a portion of the overcharge fund. Yet, the District Court denied PECO its Constitutional right to be heard when it *sua sponte* diverted all of the restitution fund to the States for use in the programs designed primarily to aid the indigent. The District Court took this action despite its finding that consumers of oil such as PECO were, in all likelihood, the victims of the overcharge. NOJC App. at A-267-68.

Longstanding precedent of this Court requires that PECO be afforded a "meaningful" hearing before its restitutionary rights can be extinguished. *See, Matthews v. Eldridge*, 424 U.S. 319 (1976); *Armstrong v. Manzo*, 380 U.S. 545 (1965). Here, PECO has not been afforded *any* hearing, much less one that could be characterized as "meaningful". PECO was never permitted to present evidence, or present its legal arguments, in support of its claim that, as an overcharged consumer, it was entitled to restitution.

In addition, the District Court's judgment constitutes a taking of PECO's property without just compensation The District Court held that the injury from the Exxon overcharges was borne by PECO and similarly situated "consumers" of petroleum. *See*, NOJC App. at A-267-68. However, the Court, in an ad hoc usurpation of the legislative function, redistributed the entire fund from those who were overcharged to a small segment of the population. The Court's action constituted an unlawful taking without just compensation in violation of the Fifth Amendment to the United States Constitution. *See, Blanchette v. Connecticut General Ins. Co.*, 419 U.S. 102, 122 (1974); *Dames & Moore v. Regan*, 453 U.S. 654, 689-90 (1981).

PECO, and the other intervenor-purchasers including the refiners, retailers, airlines, truck operators, and motorists, were deprived of their most fundamental Constitutional right to a hearing by the District Court. Unless corrected, the decisions of the Courts below will

support a similar denial of the right to be heard in all pending crude oil overcharge, and other restitution cases. *See, e.g., Department of Energy v. Hunt, et. al., supra.* This Court is respectfully requested to grant the Writ in order that PECO may have an opportunity to be heard.

B. The Courts Below Committed Errors of Law by Failing to Carry Out Their Restitutionary Duties Which Should Be Corrected By This Court.

The decisions of this Court and the prior decisions of the Temporary Emergency Court of Appeals unquestionably imposed a duty upon the District Court to order restitution to injured purchasers such as PECO. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Federal Power Comm'n. v. Interstate Natural Gas Co.*, 336 U.S. 577, 582 (1949); *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA) *cert. denied*, 459 U.S. 877 (1982). This duty includes an obligation to attempt to ascertain the victims of the overcharges by holding an evidentiary hearing if necessary. *In re DOE/Stripper Well Exemption Litigation*, 578 F.Supp. 586, 595 (D. Kan. 1983). And, as this Court held in *Interstate Natural Gas, supra*, the duty to make restitution "plainly cannot be discharged by payment of the fund to those who show no loss. . ." 336 U.S. at 582. Here, the District Court violated these well established principles in several regards. First, it failed to hold any hearings on the remedial issue or make any effort to ascertain the victims of the overcharges. Second, after concluding that consumers of oil (such as PECO) were harmed, it diverted the fund to a small segment of the population and to the exclusion of PECO by directing payment to the states for use in five programs.

However meritorious these programs may be, the District Court had no right to redistribute restitutonary funds belonging to overcharged purchasers for use in

them. If such income redistribution is to occur, it is for Congress, not the courts, to authorize.

The District Court's judgment was contrary to law and should be overruled by this Court. *See State of Tennessee v. Dole*, 749 F.2d 331, 337 (6th Cir. 1984).

C. The Majority Decision In The Court Below Is In Conflict With Other TECA Decisions On The Same Issue. These Conflicting Decisions Should Be Resolved by This Court.

Rule 17.1(a) of this Court provides that cases presenting conflicting decisions by different Courts of Appeals are appropriate for consideration by this Court. All cases arising under the Economic Stabilization Act are heard by the Temporary Emergency Court of Appeals preventing development of alternative reasoning in different Courts of Appeals. Different panels of that Court play the role of independent Courts of Appeals. A conflict does exist within TECA, and TECA has declined to resolve the conflict by denying the petitions of PECO and others for rehearing en banc. Accordingly, this Court should resolve the conflict.

In *Citronelle-Mobile Gathering, Inc. v. Edwards*, *supra*, the Temporary Emergency Court of Appeals held, in a case nearly identical to this, that:

> "*payment to the United States Treasury is not restitution*, in the true sense of the word, *or in the objectives of the Statute here involved.*
>
> * * * *
>
> Clear, however, is the fact that the sale of the overpriced oil *was made to determinable utilities* and other institutions along the Atlantic seaboard. (Emphasis supplied).
>
> * * * *
>
> Suffice it to note that the government has a *duty* to

> try to ascertain those overcharged, and refund them, with interest, from the restitution funds. (Emphasis by the Court).

669 F.2d, at 721, 723. Here, on virtually identical facts, a different panel of the same Court held "[t]here was no need for the district court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products." NOJC App. A at A-98. The majority's attempt to distinguish *Citronelle-Mobile* is unpersuasive. *See id.*, (Becker, J. dissenting in part) at NOJC App. A at A-117, 122.

The majority opinion in the Court below is in direct conflict with that Court's *Citronelle* decision as well as the TECA decisions in *United States v. ProFootball Inc.*, 514 F.2d 1396 (TECA 1975); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (TECA) *cert. denied*, 419 U.S. 896 (1974); *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (TECA 1972) *cert. denied*, 410 U.S. 928 (1973), and *United States v. Lieb*, 462 F.2d 1161 (TECA 1972).

The majority opinion is also in conflict with numerous Court of Appeals decisions imposing a duty on a court to order restitution to injured parties in analogous injunction cases. *See, e.g., Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *State of Tennessee v. Dole, supra.*

It is appropriate that this Court resolve the conflicting decisions within TECA (and between TECA and the Sixth and Eighth Circuits) promptly. This case, involving nearly two billion dollars in overcharges and important Constitutional and statutory issues destined to arise in many cases now pending and in the future, is a proper case for this Honorable Court to resolve this serious conflict.

D. The District Court's Departure From The Accepted And Usual Course Of Judicial Proceedings Requires That The Petition For A Writ Of Certiorari Be Granted.

The impropriety of the District Court's rush to dispose of this matter is highlighted by the course of action adopted by another District Court faced with the identical restitutionary duty resulting from collection of a crude oil overcharge fund. In *In re DOE/Stripper Well Exemption, supra* Judge Theis denied a motion by the States for immediate distribution, referred the matter to the Office of Hearings and Appeals ("OHA"), an agency of the Department of Energy, for fact finding and noted that the action of the District Court here was "premature." Judge Theis stated that to award the restitutionary fund to the states prior to a fact finding hearing would be a "too-hurried retreat from the objective of restitution" imposed by statute and by TECA. *In re DOE/Stripper Well Exemption Litigation*, 578 F. Supp. at 595 (D. Kan. 1983).

In the *Stripper Well Litigation*, the OHA found that it was possible to make a determination of the injury caused by the overcharge and concluded, that refiners absorbed between 2.7 and 8.1 percent of the overcharge, and passed the remainder (91.9 to 97.3 percent) through to direct purchasers such as "utilities". OHA Report, June 1985, NOJC App. C at A-381-382.

The District Court here had an equitable and statutory duty to attempt to ascertain the victims of the overcharge. Where PECO has been afforded an opportunity to be heard, it has established its claim. The appearance of judicial propriety requires that the District Court here fulfill its duty. The lower court's hasty judgment should be set aside and the matter remanded for further proceedings.

CONCLUSION

For all the foregoing reasons, PECO respectfully requests the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Nos. 85-429, 85-430, 85-432, 85-440 and 85-444

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EXXON CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the District Court abuse its discretion under § 209 of the Economic Stabilization Act of 1970, as amended, in formulating a remedy for overcharges modeled on previous restitutionary legislation, where the spreading of the consequences of the violation to consumers throughout the economy made it impossible to determine the injuries of individual victims?

2. Do any of the petitioners raise a substantial question that the District Court erroneously denied them any procedural right?

LIST OF JURISDICTIONS JOINING IN THIS BRIEF

We accept the listing of parties below as set forth in the respective petitions; however, we here specifically list the jurisdictions which join in this brief.

Alabama
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Georgia
Guam
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oregon
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota [1]
Tennessee
Texas
Utah
Vermont
Virgin Islands
Virginia
West Virginia
Wisconsin
Wyoming

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[1] South Dakota joins in the brief as *amicus curiae* pursuant to Rule 36.4 of this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF JURISDICTIONS JOINING IN THIS BRIEF	ii
COUNTERSTATEMENT OF THE CASE	1
A. The Regulatory Program	3
B. The Proceedings Below	5
1. The District Court	5
2. The Court of Appeals	9
REASONS FOR DENYING THE PETITIONS	12
I. TECA'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS EQUITABLE DISCRETION RAISES NO ISSUE WARRANTING FURTHER REVIEW BY THIS COURT	14
A. Because Section 209 of the ESA Vested the District Court with Broad Equitable Powers, the Scope of "Appellate Review is Correspondingly Narrow"	14
B. The Remedy Chosen by the District Court Was Well-Grounded in Fact and Law	15
1. The Record and Regulatory Scheme Made It Clear That It Was Impossible to Trace the Impact of Exxon's Overcharges to Individual Victims	15
2. The Restitutionary Remedy Selected by the District Court Was Equitable, Fair and Reasonable	18
3. TECA's Decision Is Entirely Consistent With This Court's Decisions	22
II. NONE OF THE PETITIONS PRESENTS A PROCEDURAL ISSUE WARRANTING REVIEW	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Adams Resources and Energy, Inc., 9 DOE ¶ 82,553 (1982) 19
Alfred B. Alkek, 9 DOE ¶ 82,521 (1982) 19
Cities Service Co. v. *FEA*, 529 F.2d 1016 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976) 5, 7
Citronelle-Mobile Gathering, Inc. v. *Edwards*, 669 F.2d 717 (Em. App.), *cert. denied*, 459 U.S. 877 (1982) 14, 22, 25
Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D. Kan.) 16
Federal Power Commission v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) 24
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 27
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 20
Hodgson v. *United Mine Workers*, 153 U.S. App. D.C. 407, 473 F.2d 118 (1972) 29
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) ... 27
Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 15
Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 14, 15, 20
NAACP v. *New York*, 413 U.S. 345 (1973) 29
Pellegrino v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953) .. 29
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 14, 15, 20, 22-23
Sauder v. *DOE*, 648 F.2d 1341 (Em. App. 1981) 14, 22
Smuck v. *Hobson*, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969) 29
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 22
Tully v. *Mobil Oil Corp.*, 455 U.S. 245 (1982) 12
Tumey v. *Ohio*, 273 U.S. 510 (1927) 18
Union Oil Co. v. *DOE*, 688 F.2d 797 (Em. App. 1982), *cert. denied*, 459 U.S. 1202 (1983) 5, 7
United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 29
United States v. *Leib*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Em. App. 1972) 22
Wolpe v. *Poretsky*, 70 U.S. App. D.C. 141, 144 F.2d 505, *cert. denied*, 323 U.S. 777 (1944) 29

TABLE OF AUTHORITIES—Continued

UNITED STATES CONSTITUTION	Page
Fifth Amendment	25
STATUTES	
Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note	
§ 209	1, 2, 5, 7, 9, 11, 14
§ 210	11
§ 211	2
Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751 *et seq.*	3, 4
15 U.S.C. § 753(b)(2)	3
15 U.S.C. § 753(b)(2)(A)	4
15 U.S.C. § 754(a)(1)	2
Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (repealed 1946)	
§ 205(a)	14, 22
§ 205(e)	22
Energy Conservation and Existing Buildings Act of 1976, Part A, 42 U.S.C. § 6861 *et seq.*	20
Energy Policy and Conservation Act, Part D of Title III, 42 U.S.C. § 6321 *et seq.*	20
§ 6322(a)(1)	21
§ 6322(c)	21
§ 6322(d)(5)	21
Energy Policy and Conservation Act, Part G of Title III, U.S.C. 42 U.S.C. § 6371 *et seq.*	20
Further Continuing Appropriations Act 1983, Pub. L. No. 97-377, 96 Stat. 1830, 1919 § 155 (1982)	8, 9, 18-22
Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8621 *et seq.*	21
National Energy Extension Service Act, 42 U.S.C. § 7001 *et seq.*	20
§ 7004(b)(6)	21
§ 7004(b)(7)	21
§ 7005(h)	21

TABLE OF AUTHORITIES—Continued

COURT RULES Page

Rules of the Supreme Court of the United States

Rule 17 12
Rule 36.4 ii

Federal Rules of Civil Procedure

Rule 24 25
Rule 24(a) 28, 29
Rule 24(b) 29
Rule 56 ..... 25, 28

REGULATIONS AND PROPOSED REGULATIONS

Executive Order No. 12287, 46 Fed. Reg. 9909..... 4

Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. § 211 *et seq.* (1984)

§ 211.67 ..... 4, 5, 7, 9, 10
Part 212, Subparts F and L 7
§ 212.83(c) 10
§ 212.83(c)(2)(iii) 7
§ 212.83(d) 10
§ 212.93(a) 10
Energy Measures and Energy Audits, 10 C.F.R. Part 450 (1985) 21

Mandatory Petroleum Products Allocation and Procedural Regulations, 39 Fed. Reg. 1924 (1974) 4

Allocation of Old Oil, 39 Fed. Reg. 31650 (1974), *reprinted in* Energy Mgmt. (CCH), Proposed Regulations 1974-1978, ¶ 12,526 4

LEGISLATIVE MATERIALS

128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982).... 19
128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982).... 18
128 Cong. Rec. S15117 (daily ed. Dec. 16, 1982).... 20
128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982).... 19

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On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION [1]

COUNTERSTATEMENT OF THE CASE

This is an action brought by the United States under § 209 of the Economic Stabilization Act of 1970 ("ESA"),

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[1] This brief is filed on behalf of the States and other jurisdictions listed on p. ii, *supra*. Although we maintain that the courts below correctly resolved all questions of liability (including amount) in favor of the United States and against the Exxon Corporation ("Exxon"), because of the limited scope of the intervention which we were granted below, this brief does not respond to Exxon's petition for certiorari (No. 85-429), which presents no question concerning the distribution of the amounts for which Exxon was held liable.

The opinions below will be cited to the Appendix to the Exxon petition ("Exx. App.").

as amended,[2] against Exxon Corporation, alleging that the prices Exxon charged beginning in January 1975 for crude oil produced from the Hawkins Field Unit ("HFU") in Texas exceeded the maximum prices permitted by law. The District Court found in favor of the United States on the issue of liability. In fashioning an equitable remedy under § 209, the District Court accepted the Government's contention that, "[d]ue to the pervasive reach of oil price regulation at the time these overcharges occurred, . . . the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products*," [3] and ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [4], to be held in trust for immediate redistribution to the States,[5] in proportion to each State's share of nationwide consumption of petroleum products, for expenditures on energy-related programs designed to benefit their injured citizens.[6] TECA, which has exclusive appellate jurisdiction in all ESA and EPAA matters (see ESA § 211), affirmed the District Court's Order.

Four petitions for certiorari, in addition to that of Exxon, have been filed by intervenor-parties at virtually every level of distribution and use of petroleum products,

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[2] 12 U.S.C. § 1904 note, as incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 754(a)(1). In relevant part, § 209 of the ESA provides that a court may "order restitution of moneys received in violation of any . . . order or regulation [under this Title]."

[3] Exx. App. 239a (emphasis added).

[4] Exx. App. 254a.

[5] As used herein, the term "States" refers to all fifty States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands.

[6] Exx. App. 255a-256a.

from refiners to an individual motorist.[7] All challenge the District Court's restitutionary order and contend that awards should instead have been made to them (and to the classes which some purport to represent).

A. The Regulatory Program

The District Court's Order and TECA's affirmance rest squarely on the regulatory program which these decisions implement: we therefore begin by describing that program.

The EPAA, 15 U.S.C. § 751 *et seq.*, directed the President to promulgate regulations implementing price and allocation controls on petroleum and petroleum products, and further directed, in relevant part, that:

> [i]n specifying prices (or prescribing the manner for determining them), the regulation shall provide for (A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level . . . [EPAA, § 4(b)(2), 15 U.S.C. § 753(b)(2)]

"Passthrough" is the key word in this passage and the cornerstone of the implementing regulations. From their

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[7] The four petitions were filed by: Marathon Petroleum Company, Mobil Oil Corporation, Murphy Oil Corporation, Ashland Oil, Inc., Pennzoil Company, Tenneco Oil Company, and Tosco Corporation (collectively "Marathon") (No. 85-430); Air Transport Association of America, Petroleum Marketers Association of America, The Jobbers' Group, and Independent Gasoline Retailers (collectively "ATA") (No. 85-432); Philadelphia Electric Company ("PECO") (No. 84-440); and National Freight Inc., RJG Cab Co. Inc., and Geraldine H. Sweeney (collectively "National Freight") (No. 85-444). These petitions and their appendices are referred to hereafter, respectively, as, "Mar. Pet." and "Mar. App.", "ATA Pet." and "ATA App.", "PECO Pet." and "PECO App.", and "Nat. Frt. Pet." and "Nat. Frt. App." The 45-volume Record of proceedings in the District Court as filed in the TECA will be referred to by volume number and page number as "— R. —."

adoption on January 14, 1974,[8] until all petroleum products were decontrolled on January 28, 1981,[9] the regulations promulgated pursuant to the EPAA permitted refiners, crude oil resellers and petroleum product resellers to pass through to their customers their net increases in crude oil costs for refined petroleum products, together with their increased costs of purchased refined products and certain "non-product" costs.[10] On August 30, 1974, the Department of Energy's ("DOE") predecessor agency, the Federal Energy Administration ("FEA"), published a Notice of Proposed Rulemaking concerning the Old Oil Allocation ("Entitlements") Program.[11] FEA stated that "[t]he objective of the entitlements program proposed is to achieve the equitable distribution of the low priced old oil among all sectors of the petroleum industry . . . ." (39 *Fed. Reg.* at 31650). FEA also commented that "[u]nder the proposal, all money spent or received as the result of the purchase or sale of entitlements would be passed through to consumers, either as a cost increase or decrease, respectively." (*Id.*).

Effective November 29, 1974, FEA adopted regulations instituting the Entitlements Program.[12] In keeping with the Congressional mandate that there be "dollar-for-dollar passthrough of the net increases in the cost of crude oil," 15 U.S.C. § 753(b)(2)(A), the regulations provided that the entitlements costs or proceeds would be included in crude oil cost calculations. In upholding the constitutionality and validity of the Entitlements Program, TECA explained:

> The basic purpose of the Entitlements Program was to spread the benefit of access to old price-controlled

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[8] *See* 39 *Fed. Reg.* 1924 (1974).

[9] *See* Exec. Order No. 12287; 46 *Fed. Reg.* 9909 (1981).

[10] *See* 10 C.F.R. § 212.83(c) and (d).

[11] *See* 39 *Fed. Reg.* 31650 (1974).

[12] *See* 10 C.F.R. § 211.67 (1974).

> oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, *all regions of the country, and among all consumers of petroleum products. . . .*[13]

As TECA stated in its opinion herein, one consequence of the Entitlements Program was that if, as happened here, price-controlled crude was improperly certified as exempt (or higher priced) crude oil, the effects of the overcharges initially would be distributed among all domestic refiners; thereupon "the regulatory system was designed to insure that money spent or received by the refiners as the result of their purchases or sales of entitlements would be passed along to the ultimate consumers." [14]

B. The Proceedings Below

1. *The District Court*

On June 8, 1978, DOE instituted this enforcement action against Exxon under § 209 of the ESA, alleging that the prices Exxon had been charging since January 1975 for crude oil produced from the HFU exceeded the maximum prices permitted by law. (I R. 16). In its prayer for relief, DOE urged the District Court to order Exxon to pay the overcharges, with interest, to the United States Treasury.[15] Over the ensuing 4 years, the District Court issued 8 reported opinions and over 100 separate

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[13] *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976) (emphasis added).

[14] Exx. App. 87a, citing *Union Oil Co.* v. *DOE*, 688 F.2d 797, 802 (Em. App. 1982), *cert. denied*, 459 U.S. 1202 (1983). See also the decision of the District Court herein quoted at p. 7, *infra*.

[15] "Plaintiff prays that this Court enter judgment in its favor upon this Complaint: . . . 3. Ordering that Exxon make restitution of moneys, in the form of payments to the United States Treasury, equal to the amount of its overpricing for first sales of crude oil from the [Hawkins Field Unit];" (I R. 33).

orders, and TECA issued 3 reported opinions on interlocutory appeals brought by Exxon.

On August 27, 1982, DOE and Exxon filed cross-motions for summary judgment presenting both liability and remedy issues for decision. On November 24, 1982, five weeks *after* oral argument on the summary judgment, a group of 6 refiners, including 4 of the 7 petitioners in No. 85-430, and a trade association representing other refiners ("Indicated Refiners") filed a "Conditional Motion . . . To Intervene" in which they argued, as Exxon had, that "it is impossible to trace the impact of the overcharges," and that, based upon precedent in private antitrust damage actions, refiners should receive the entire overcharge fund (XLV R. 38973). Some three months *after* oral argument, 5 gasoline station operators ("Gasoline Retailers"), purporting to represent 187,000 independent branded retailers throughout the United States, filed a motion for limited intervention in the District Court; they urged that the "impact of the overcharge" should be traced through the DOE Entitlements Program to the "more than 200 refiners nationwide" and then, "taking into account each refiner's banked costs" and DOE's "[c]omprehensive compliance audits", to all "purchasers of refined products throughout the period of violation" (XLV R. 38995-38997). At Exxon's request, the District Court stayed consideration of both the Indicated Refiners' and the Gasoline Retailers' intervention motions. (ATA App. A-288 and A-289.)

On March 25, 1983, the District Court issued its Memorandum Opinion holding Exxon liable for some $895 million in crude oil overcharges between January 1975 and January 1981, plus interest. The District Court determined that, as a matter of law, Exxon was required to change its accounting practices relating to Hawkins Field crude oil on January 1, 1975, and that there was no factual dispute as to its failure to do so.

In fashioning an equitable remedy under § 209 of the ESA, the District Court determined that "the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products.*" [16] Following TECA's prior holding concerning the operation of the Entitlements Program, the District Court reasoned that "[j]ust as the program spread the benefit of access to old oil, so too did the program spread the burden of Exxon's overcharges among all sectors of the petroleum industry, all regions, and all consumers [of petroleum products]." [17] The District Court also referred to record evidence of Exxon's admitted understanding of this impact [18] as well as the cost-passthrough effects of DOE's price regulations.[19] It determined:

> Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country.[20]

Accordingly, the District Court found that:

> [t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each.[21]

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[16] Exx. App. 239a (emphasis added).

[17] Exx. App. at 248a, citing *Cities Service Co.* v. *FEA*, p. 5 n.13, *supra*. *See also id.* at 248a-249a, quoting *Union Oil Co.* v. *DOE*, *supra*, p. 5, n.14.

[18] Exx. App. 248a-249a.

[19] Exx. App. 249a, citing 10 C.F.R. § 212.83(c)(2)(iii) and 10 C.F.R., Part 212, Subparts F and L.

[20] Exx. App. 249a. Based on this finding, the District Court initially denied the conditional intervention motion of the Indicated Refiners and the motion for limited intervention of the Gasoline Retailers. Exx. App. 249a, n.56.

[21] Exx. App. 250a.

The District Court ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [22] to be held "in trust" [23] for distribution to the States, in proportion to each State's share of nationwide consumption of petroleum products, for use in energy-related programs designed to benefit their injured citizens.[24] The procedures for disbursement to the States were modeled on the Congressional enactment of § 155 of the Further Continuing Appropriations Act, 1983.[25] The District Court explained:

> *In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.* However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs.

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[22] Exx. App. 254a.

[23] District Court Judgment, XXXV R. 31658 at 31659.

[24] Exx. App. 255a-256a. The programs are listed *infra* at p. 20, n.41.

[25] Pub. L. No. 97-377, 96 Stat. 1830, 1919, § 155 (1982) ("Warner Amendment" or the "Amendment"), reproduced at ATA App. A-316. In the Warner Amendment, Congress directed the Secretary of Energy to distribute up to $200 million in escrowed overcharge funds for energy related uses by the States in proportion to the relative consumption of both price-controlled and uncontrolled petroleum products in each State during the period in which price controls were in effect.

> The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. *Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case.* [Exx. App. 256a, footnote omitted, emphasis added.]

Thereafter 33 States and Territories and the District of Columbia were allowed to intervene to support the District Court's restitution order on appeal.[26] Six additional separate motions to intervene were filed by a joint total of 14 parties, including refiners, jobbers, utilities, a trucking company, a taxicab company, and an individual motorist. Each of these motions sought only to intervene for purposes of appeal. None moved the District Court to reopen the record on the question of the feasibility of tracing the effect of the overcharges or for a hearing on or reconsideration of any issue. The District Court granted all applications for intervention, including on reconsideration those of the Indicated Refiners and the Gasoline Retailers, for the purpose of arguing the remedy issue on appeal. (*See* ATA App. A-290 through A-298).

2. *The Court of Appeals*

On appeal, TECA unanimously affirmed the judgment of liability against Exxon. By a 2-1 vote, TECA also affirmed the District Court's remedy under § 209.

TECA rejected the contention "that the trial court was required to trace, or attempt to trace, the overcharges from first purchaser, to refiner, through various monthly accountings required by the Entitlements Program and its 'banking' system, and then to determine the nature

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[26] Subsequently, 12 additional States intervened for the same purpose before TECA.

and extent of any passthrough of increased costs through the distribution system, such as might be authorized by 10 C.F.R. Section 212.83(c)-(d) (refiners) and 212.93(a) (resellers and retailers)." (Exx. App. 85a). TECA agreed with the District Court that:

> any attempt to trace the overcharges would be doomed to failure because of the pervasive influence of the Entitlements Program and other regulations which had the effect of passing on and diffusing the HFU overcharges through the distribution system. [Exx. App. 86a-87a.]

TECA explained the consequences of the Entitlements Program whereby overcharges would be passed along to the ultimate consumers (Exx. App. 87a; *see* pp. 3 to 5, *supra*) and continued:

> We agree with the trial court's conclusion that any attempt to trace increased costs attributable to the HFU overcharges would require a full scale audit of the entire petroleum industry, and that any effort to do so would be futile. As the Government suggests, the first step in any such audit would require recalculating over seventy monthly entitlement lists issued during the period of the overcharges, taking into account such variables as the volumes of new and old oil produced during each month, the average acquisition costs, and the values of each entitlement. In determining the precise impact of the overcharges on any particular refiner, it would then be necessary to consider the impact of exception relief which may have been granted by the agency over the term of the Entitlements Program.
>
> * * *
>
> Even if the HFU overcharges could be traced to individual refiners, it would then be necessary to trace their effect on product resellers, retailers and consumers, through the provisions of passthrough regulations. That this task would be futile is illustrated by the difficulty of applying only one aspect of the regulations, that is, the calculation of "banked

> costs." Exxon itself admitted that it was unable to supply information on its own costs. . . .
>
> * * *
>
> The fact that banked costs might exist as to any particular refiner does not mean of course that increased costs were not passed on through the distribution system. To determine this would require an investigation into the state of mind of each refiner in setting prices for individual petroleum products each month. Such a task would be impossible, and several of the intervenors have so conceded. [Exx. App. 88a-90a.]

TECA rejected the refiners' suggestion "that refunds be made payable to themselves as 'first purchasers' [because] that would result in inequities, inconsistent with the fundamental purpose of restitution under Section 209." (Exx. App. 90a). Moreover, TECA ruled:

> There was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products. In this respect, it should be noted that this action for restitution under Section 209 differs in significant degree from a private action of damages under Section 210 [Exx. App. 90a-91a.]

In conclusion, TECA approved the "form of relief chosen by the trial court in this action by which the restitution funds will be channeled through the states for use in the enumerated energy programs designed to benefit the consuming public . . . ." (Exx. App. 91a):

> We believe this form of disbursement to be equitable, and fair, and a reasonable method of compensating the consuming public for the HFU overcharges. It accomplishes the intent of Congress that violators of the price regulations be required to disgorge their gains, even in situations where it may not be possi-

> ble to identify and compensate each individual victim. While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest. [Exx. App. 91a-92a, footnote omitted.]

Petitions for rehearing and/or suggestions for rehearing *en banc* filed by Exxon and several intervenor appellants were denied. (Exx. App. 269a-270a). On October 23, 1985, TECA denied a motion by Marathon, Mobil and Murphy for leave to file a second petition for rehearing.

REASONS FOR DENYING THE PETITIONS

The several petitions filed herein uniformly fail to demonstrate that there are, as Rule 17 requires, "special and important reasons" for this Court to grant another round of review of the District Court's exercise of its equitable discretion in formulating a restitutionary remedy for this case. The remedy chosen rests on the District Court's reasoned conclusion—based upon the regulatory scheme and the voluminous record before it—that the consequences of Exxon's overcharges were spread throughout the economy so that individual victims and amounts of injury cannot possibly be identified and that, ultimately, all oil products consumers nationwide suffered as a result of the overcharges. Accordingly, the District Court fashioned a well-grounded remedy to benefit those ultimate consumers.

In turn, TECA, "a court intimately familiar with the intricacies of federal energy regulations," (*Tully* v. *Mobil Oil Co.*, 455 U.S. 245, 248 (1982)), and empowered with exclusive appellate jurisdiction in these matters, agreed with the District Court's findings, and approved its choice

of remedy as "equitable, and fair, and a reasonable method of compensating the consuming public for the . . . overcharges". (Exx. App. 91a). In so ruling, TECA observed that "other remedies might have been adopted by the trial court" (Exx. App. 92a), and thus refrained from limiting future decisions in similar cases. Thus, far from deciding any "important question of federal law which has not been, but should be settled by this Court", it merely applied its long experience with and expertise in the regulatory mechanism it supervises to confirm that the District Court's restitutionary choice not only fell within the broad equitable discretion which prior opinions of this Court and TECA had already settled, but was a commendable exercise of that discretion in the complex context of the particular regulatory violation at issue, where identification of individual injury among many millions of potential claimants was impossible. Petitioners' attempt to narrow this discretion, and to have this Court require the trial court in every case to attempt identification of individual injury even where that task is impossible, lacks both logic and precedent.

Finally, the petitioners' various contentions that they were improperly denied procedural rights are wholly without merit. The only petitioners who sought intervention in the District Court prior to the entry of judgment did so well after final oral argument on the summary judgment motions, and their intervention papers merely added reasons for a finding of impossibility, as described above. All other petitioners requested—and were granted—intervention only for purposes of appeal. Thus, there has been no departure "from the accepted and usual course of judicial proceedings" requiring further review by this Court.

I. TECA'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS EQUITABLE DISCRETION RAISES NO ISSUE WARRANTING FURTHER REVIEW BY THIS COURT

A. Because Section 209 Of The ESA Vested The District Court With Broad Equitable Powers, The Scope Of "Appellate Review Is Correspondingly Narrow"

Section 209 of the ESA, under which the United States brought this suit against Exxon, provides that, in addition to the power to issue mandatory injunctions granted therein, "the court may also order restitution of moneys received in violation of any . . . order or regulation [under this Title]." The District Court was thus vested with broad discretionary power.[27] As Justice Harlan wrote in *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960):

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.

Justice Harlan also quoted with approval and followed this Court's decision on the scope of equitable jurisdiction under § 205(a) of the Emergency Price Control Act of 1942, *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946):

> Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a pro-

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[27] Exx. App. 86a; *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 721-722 (Em. App.), *cert. denied*, 459 U.S. 877 (1982); *Sauder* v. *DOE*, 648 F.2d 1341, 1348 (Em. App. 1981).

> ceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . .
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503. [361 U.S. at 292, quoting 328 U.S. 397-398].

These decisions give special force herein to a corollary of the trial court's "broad discretionary power" in shaping equity decrees—that "appellate review is correspondingly narrow." *See Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973) (Op. of Burger, C.J.). *A fortiori*, where as here, the Court of Appeals has approved as "equitable, and fair, and . . . reasonable" the District Court's exercise of its equitable jurisdiction, only a most compelling showing of abuse could justify a second round of review by this Court. No such showing has been made by any of the petitioners herein.[28]

B. The Remedy Chosen By The District Court Was Well-Grounded In Fact And Law

1. The Record And Regulatory Scheme Made It Clear That It Was Impossible To Trace The Impact Of Exxon's Overcharges To Individual Victims

The District Court found, on the basis of the record before it: "The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of

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[28] Petitioners are not identically situated substantively or procedurally. Where pertinent in this discussion, we will identify particular petitions or petitioners. Otherwise, the term "petitioners" will mean some or all of those identified in n.7, *supra*.

the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." (Ex. App. 250a).[29] (See p. 7 *supra*). TECA "agree[d] with the trial court that any attempt to trace increased costs attributable to the HFU overcharges would require a full-scale audit of the entire petroleum industry, and that any effort to do so would be futile." (Exx. App. 88a). It explained that conclusion by detailed examination of the regulatory scheme, about which it has developed special expertise in the exercise of its exclusive appellate jurisdiction.

Petitioners point to no evidence which was in the record before the District Court which contradicts, let alone renders unreasonable, the District Court's and TECA's conclusion that the ultimate victims of Exxon's overcharges and the extent of their individual injuries cannot be ascertained in any manageable proceeding. Nor did any of the petitioners offer to present such evidence to the trial court in motions to intervene or otherwise. Here, however, they rely on a 1985 report by DOE's Office of Hearing and Appeals (the "OHA report") in a separate, ongoing proceeding.[30] That report, obviously,

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[29] The tracing issue was vigorously litigated before the District Court entered judgment. As that court observed, in order "to postpone its day of reckoning" Exxon had argued:

> that it must be allowed to conduct further discovery to determine if the Entitlements Program in fact operated as it was designed and to trace the Hawkins Field overcharges to their ultimate victims. In effect, Exxon would like to launch a nationwide inquiry into the workings of more than 200 domestic refiners during a period of several years. [Exx. App. at 247a-248a.]

[30] Report of the OHA to the United States District Court for the District of Kansas in *Department of Energy Stripper Well Exemption Litigation* ("*Stripper Well Litigation*"), M.D.L. No. 378, reproduced in ATA App. at A-320. Although OHA's factfinding in the *Stripper Well Litigation* should have no bearing upon the correctness of the District Court's earlier findings in this case, based upon the record at the time judgment was entered, the States note

was not before the District Court when it rendered its decision or thereafter. In fact, the OHA report was issued on June 21, 1985, more than a year after oral argument of this case before TECA and less than two weeks before TECA issued its opinion affirming the District Court.[31] The District Court's finding cannot be overturned on the basis of a report which was not before it.[32] Nor can it be overturned on the basis of a criticism of that report,

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that, like the District Court here, the recent report found, after nearly two years of effort, that:

> it is impossible to trace these increased costs [of crude oil to all domestic refiners] through an individual refiner's refining, distribution and marketing operations. In fact, no party sought to establish such a tracing in the context of this proceeding, or suggested a valid tracing methodology based on inspection of an individual refiner. [ATA App. A-339.]

[31] ATA's assertion that the "very facts" which it alleges concerning the possibility of tracing "appear *in the instant record* in the form of a detailed fact finding report by the OHA" (ATA Pet. 14) is, therefore, incorrect. Indeed, when the OHA report was submitted to TECA that court was careful to provide only "that the Report of OHA of June 21, 1985 be filed in the Office of the Clerk of this Court." Order Denying Without Prejudice Motion To Permit Parties To File A Supplemental Brief On The Significance Of The June 21, 1985 OHA Report And Granting Leave To File The Report. (ATA App. at A-189.)

[32] Indeed, the Kansas district court has not yet decided whether to adopt the OHA report. Moreover, in relying on that report for the proposition that it would be feasible to trace the injuries of the victims of the overcharges, petitioners fail to take due account of the two serious deficiencies which that report itself acknowledges:

First, the report rests on assumptions and estimates which it admits are subject to valid criticism. It is, in its own terms, only one theoretical estimate of the impact on the refining industry as a whole if a particular set of contested assumptions is applied.

Second, as the report states, *no methodology exists by which to determine the impact on any particular refiner, much less downstream customers of any refiner or direct purchaser. See* n.30, *supra*; ATA App. at A-346, A-380 to A-381.

as three refiners remarkably argue in a supplemental brief.[33]

2. *The Restitutionary Remedy Selected By The District Court Was Equitable, Fair and Reasonable*

The District Court's decision to look to the Warner Amendment (also referred to as "§ 155") as the model for its choice of restitutionary distribution to benefit consumers was a sound exercise of its discretion since "the victims of the petroleum overcharges cannot be identified." (Exx. App. 256).[34] Three points about the Amendment are especially noteworthy. First, Congress stated that where particular injured individuals "cannot be *reasonably* identified," or their injury "is too small to be capable of *reasonable* determination," a refund for energy related purposes through the States is one which is "*reasonably* expected to benefit the class of persons injured." § 155(a) (emphasis added).[35] Second, in choosing a State-

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[33] *See* Supplemental Brief of Petitioners Marathon, Mobil, and Murphy in Support of Petitioners (No. 85-430). The materials which that brief presents concerning a controversy over various drafts of the OHA report are, of course, entirely outside the record which was before the District Court and before TECA when it affirmed. It is a measure of these petitioners' desperation that they must rely on such materials, and on the contention that OHA's supposed bias creates a due process issue under *Tumey* v. *Ohio*, 273 U.S. 510 (1927), in order to seek review of a judgment which did not in any way depend on the OHA report.

[34] Because of the change of circumstances resulting from decontrol in 1981, previous mechanisms for passing refunds along the distribution chain to ultimate consumers no longer exist. Thus, as TECA stated, refunds to first purchasers would "result in inequities, inconsistent with the fundamental purpose of restitution under § 209." (Exx. App. 90a).

[35] *See, e.g.*, 128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982) (statement of Senator Percy):

> This money would come from $200 million now in escrow which has been collected from oil company overcharges to consumers during the seventies. This money rightfully belongs to the con-

based remedy, Congress necessarily found that paying such funds to the States, in proportion to their oil product consumption and on behalf of their injured citizens for energy related purposes, is "restitutional." *Id.* Third, in adopting the Amendment, Congress confirmed the propriety of DOE's repeated use of the State remedy to benefit ultimate consumers,[36] and accelerated what DOE had been intending to do with escrowed overcharge funds even without Congressional action, *i.e.*, distribute funds to States on behalf of ultimate consumers.[37]

The petitioners' primary disagreement with the District Court's remedy is, of course, that they would prefer to receive the money themselves. While they do raise objections directed specifically to the use of the Warner Amendment, these do not have any merit.

a. Petitioners argue that the District Court should not have turned to the Warner Amendment as a model be-

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sumers who were actually overcharged during this period. But because it is impossible to identify each individual consumer, we should at least attempt to place this money where consumers in general will benefit. Distribution to the States provides the quickest means to get this money out.

[36] *See e.g., Alfred B. Alkek*, 9 DOE ¶ 82,521, at p. 85,134 (1982) ("We chose to distribute the money to state governments because we believed that they would be able to design a distribution scheme for the refund proceeds which would benefit all injured consumers in each state, and account for the varying energy-related needs of their citizens. We also believe that the states would be able to expend the proceeds in an administratively efficient and cost-effective manner."); *Adams Resources and Energy, Inc.*, 9 DOE ¶ 82,553 at p. 85,292 (1982).

[37] In proposing the Amendment, Senator Warner stated: "The Department of Energy is seeking to provide secondary remedies to State governments and is currently reviewing a distribution plan which I understand is consistent with this amendment." 128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982). *See also* 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (statement of Senator Kennedy): "DOE has in part been proceeding in this fashion. It is the most appropriate method of providing restitution for the injuries suffered by the consumer."

cause the Amendment provided only for a one-time distribution of funds. The argument overlooks the court's clear statement that it was "in no way rel[ying] on Section 155 as an express statutory grant of authority to this court but [was acting] instead in the exercise of its broad equitable power to order restitution." (Exx. App. 256a, quoted at p. 8, *supra*).[38] Congress' decision not to *compel* future distribution on the basis of the Warner Amendment formula [39] cannot be taken as precluding a court of equity from choosing to do what Congress had done and for similar reasons.[40] "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *DeMario Jewelry*, 361 U.S. at 291, *quoting Porter*, 328 U.S. at 398; *see also Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944).

b. Some petitioners present undocumented assertions that they will not receive any benefit at all from the programs which the States must fund under the District Court's order.[41] While there is no requirement that the

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[38] This fact renders frivolous the assertion of the National Freight petitioners that by selecting the approach of the Warner Amendment, the District Court violated the constitutional separation of powers. (Nat. Frt. Pet. 13-14, 21-22).

[39] The Senate-passed version made the Warner mechanism *mandatory* in all future cases. *See* 128 Cong. Rec. S15117 (daily ed., Dec. 16, 1982).

[40] Petitioners rely especially on the comments of Congressman Dingell as forbidding any use of the Warner Amendment as precedent; but, where, as shown above, the statute on its face makes clear Congress' view that its own remedy was reasonable and restitutionary, a court may accept the soundness of that judgment.

[41] The five Federal energy conservation programs involve (1) weatherization of buildings (*see* 42 U.S.C. § 6861 *et seq.*); (2) implementation of State energy conservation programs (*see* 42 U.S.C. § 6321 *et seq.*); (3) reduction of energy consumption in, or the funding of alternate energy sources for, schools and hospitals (see 42 U.S.C. § 6371 *et seq.*); (4) promotion of conservation by small businesses and individuals, (*see* 42 U.S.C. § 7001 *et seq.*); and (5)

remedy adopted by the court directly benefit each person who was injured by the overcharges, it is plain that petitioners' view of these programs is far too narrow. For example, State energy conservation plans are intended to reduce total energy consumption by all citizens and businesses within the State. *See* 42 U.S.C. § 6322(a)(1).[42] A reduction in demand can lower oil product prices, benefitting all buyers, especially commercial users, in proportion to consumption, and in long-range terms will reduce the dangers of harmful energy shortages. Moreover, the provisions which are listed in the District Court's order are sufficiently broad and flexible to permit funding of programs which would quite specifically benefit businesses such as those represented by various petitioners. Without attempting to be exhaustive, we note in the margin some possibilities which readily come to mind.[43]

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assistance to low-income people in paying home utility bills (*see* 42 U.S.C. § 8621, *et seq.*). *See* Exx. App. 255a, n.58.

[42] To achieve that goal, the plans are *required* to promote more efficient lighting for public buildings and thermal efficiency standards and insulation requirements for new and renovated buildings. 42 U.S.C. § 6322(c). The States are further permitted to adopt transportation controls, programs of public education, and "any other appropriate method or programs to conserve and to improve efficiency in the use of energy." 42 U.S.C. § 6322(d)(5).

[43] State energy conservation plans are intended to be coordinated with the operation of State energy extension service plans, 42 U.S.C. § 7005(h), which in turn allow the States to provide on-site energy use evaluations and recommendations to consumers and businesses, including information about the availability of aid for "planning, financing, installation, and effective monitoring of energy-related facilities and activities." 42 U.S.C. § 7004(b)(6) and (b)(7). Airports and airlines could seek aid for airport improvements to reduce fuel burning caused by delays in landing time under these provisions. Part 450 of 10 C.F.R. contains a list of energy conservation measures already approved by DOE for implementation by State energy extension services with both residential and industrial applications, including, for example, audits, insulation measures, control systems and installation of high efficiency

In short, it was fully appropriate for the District Court to look "at the policy of the legislation and fashion[] a remedy that will effectuate that policy," *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957), and in doing so, (as the District Court said) to "respect[] the wisdom of the solution chosen by Congress and [to] adopt it as the most appropriate equitable remedy in the circumstances of this case." (Exx. App. at 256a).

3. *TECA's Decision is Entirely Consistent With This Court's Decisions*

TECA in this case and in its prior decisions has fully attended to this Court's major teaching in *Porter* v. *Warner Holding Co., supra,* that in these public enforcement cases, courts should exercise broad and flexible powers to do equity.[44] Nevertheless, citing private damage action precedents, and ignoring *Porter's* distinction between such private actions and public restitution actions,[45] petitioners argue that *Porter* restricted the scope of equitable jurisdiction, and required individual injury determinations in every overcharge restitution case. They do so by tearing out of context the concluding paragraph of the *Porter* opinion, from which they quote.[46] That paragraph

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equipment. These are precisely the type of efforts in which many utilities already engage and which the States could help finance under the remedy adopted by the District Court.

[44] *See Citronelle-Mobile* and *Sauder*, p. 14, n.27, *supra.*

[45] "Restitution, which lies within that equitable jurisdiction [granted by § 205(a) of the 1942 price control Act] is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e)." 328 U.S. at 402.

[46] Marathon's argument that by "restitution, Congress meant the refund of overcharges to the party injured" as in *United States* v. *Lieb*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Em. App. 1972) (Mar. Pet. 15), is wholly without merit. Where Congress takes pain to confirm an expressly "inherent equitable power" of historically large scope, its action is not to be construed as nar-

set forth the trial court's authority and responsibility on remand to resolve "conflicting claims and counterclaims between tenants and landlord as to the amounts due . . ." (328 U.S. at 403). The "interested parties" whom the trial court was instructed to bring in, if necessary, were the tenants against whom the landlord had such counterclaims, a small and readily ascertainable class.[47] The purpose of bringing them in was not to allow them to assert claims for restitution (which the Secretary was doing on their behalf) but to enable the court to adjudicate any "counterclaims" against them by the landlord.

Because "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each," [48] the teachings of *Porter* which are truly applicable in this case are those which forcefully affirm the broad powers of the courts of equity to fashion a restitutionary remedy, *see* pp. 14 to 15, *supra.* Petitioners' insistence that proceedings were required which would enable them, and the literally countless other persons and entities who were similarly

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rowing the courts' discretion by requiring them to conform to the particular circumstance of a case which is cited in the legislative history to illustrate that the power already exists.

[47] This portion of the *Porter* opinion was a response to the landlord's argument, based on evidence that he "may have valid counterclaims against certain tenants for damage to or theft of its property." (Br. for Warner Holding Co., No. 793, Oct. T. 1945, p. 36, quoting 60 F. Supp. 513, 526.) This Court's opinion answered the trial court's question: "Could this court, without a jury, adjudicate the amount of restitution in each of the twenty rental units involved here, some of which have had several different tenants, without the tenants before it and without the defendant having an opportunity to interpose valid counterclaims as a defense?" (*Id.*) This Court held that a court of equity did have the power to adjudicate the counterclaims and to bring the tenants before it for that purpose.

[48] Exx. App. at 250a.

situated, to prove their individual injuries in order that they may be compensated, cannot be reconciled with those teachings. Indeed, as the District Court recognized, adoption of the petitioners' position would, as a practical matter, nullify the restitutionary remedy "because DOE [or a court] could never accurately determine the losses suffered by any one claimant." (Exx. App. at 253a.)

The decision below is also entirely consistent with *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). While *Interstate* directed the federal court to make a "prognostication" as to what would in fact have happened as a consequence of federal or State law if the stay had not been issued (*id.* at 584), it was evidently anticipated that this task could readily be accomplished:

> Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process. [*Id.*]

Here, by contrast, the courts below have found that allocating the fund among the potential individual claimants is "impossible." (Exx. App. 86a-91a, 247a-151a).[49]

Surprisingly, since this Court does not sit to resolve intracircuit conflicts, petitioners attempt to make much of a supposed inconsistency between the decision below

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[49] Some petitioners place particular reliance on a portion of Justice Frankfurter's separate concurring opinion. In so doing, they omit the concluding sentence of the paragraph from which they quote: "It will be time enough to distribute the fund by some makeshift rule of thumb if what is concededly a rule of intrinsic fairness should be found judicially unenforceable." (336 U.S. at 590). Justice Frankfurter recognized that even a "makeshift rule of thumb" would be preferable to imposing upon the lower court a duty which it could not perform; here, no "makeshift" rule was needed since there existed a model well grounded in Congressional and administrative example.

and that in *Citronelle-Mobile Gathering, supra.* In so doing, petitioners simply disregard TECA's careful and detailed explanation (Exx. App. 85a-87a) of why "the District Court's judgment and Order . . . are fully in accord with our ruling in *Citronelle* . . . ." (*Id.* 85a).

II. NONE OF THE PETITIONS PRESENTS A PROCEDURAL ISSUE WARRANTING REVIEW

Petitioners present an array of procedural objections to the District Court's decision, invoking variously Rules 24 (intervention) and 56 (summary judgment) of the Federal Rules of Civil Procedure and the Due Process Clause of the Fifth Amendment. Their common objection, whatever the form of their individual arguments, is that the District Court should have granted them a hearing on the issue of remedy. A close examination of the proceedings below and of the respective petitions shows that none of the petitioners present a procedural issue meriting review.

A. At the outset, it is essential to recall that most of the parties that are now petitioners here sought leave from the court to intervene *only for the purposes of appeal.* This was true of all the parties who moved to intervene after the court issued its decision—specifically three of the refiners who petition in No. 85-430 (Marathon, Mobil and Murphy); all parties to the ATA petition (No. 84-432) except the Gasoline Retailers (specifically ATA, Petroleum Marketers and Jobbers); as well as PECO (No. 85-440); and all parties to the National Freight petition (No. 85-444) (National Freight, RJG Cab and Sweeney). These parties did not move the District Court for leave to adduce any evidence to refute any of the findings which the court had made or otherwise to reconsider its decision. In short, since the District Court granted the postjudgment movants all the intervention which they sought, they cannot now assert that the court denied them any procedural rights.

B. This leaves to be considered only the procedural objections of the prejudgment (but post-oral argument) movants, the Indicated Refiners and the Gasoline Retailers.

1. Four of the refiners who were parties to the Indicated Refiners' prejudgment motion to intervene have joined in the Marathon petition;[50] that petition raises two related procedural issues. (Mar. Pet. i).

The first is that the District Court should have given notice and an opportunity to be heard to all potential claimants. That issue is insubstantial. The court could not possibly provide notice or an opportunity to be heard to all such persons, which include not only the present intervenors, but all others similarly situated, including, for example, 187,000 gasoline retailers and tens of millions of individual motorists. The refiners have asserted that *they* were injured and were unable to pass through all of the overcharges, but not that other persons such as consumers bore none of the burden. Moreover, as the refiners recognize, TECA ruled that such notice was unnecessary "on the theory that actual overcharges are incapable of judicial proof." (Mar. Pet. 20). They now contend—and this is the second part of the question which they present—that "that 'finding' is pure speculation." (*Id.*).

As shown above, however, the District Court's finding was fully substantiated in the Court's analysis of the regulatory framework and the particular record before it, the issue having been pressed by Exxon. Even more important for present purposes, the refiners cannot ask this Court to review that finding because, far from proffering any contrary evidence, they conceded the impossibility of tracing the overcharges below. In the District Court the Indicated Refiners asserted that "it is impossible to trace the impact of the overcharges directly to

[50] They are Ashland, Pennzoil, Tenneco and Tosco.

any subsequent purchasers." (XLV R. 38973). Before TECA, the other refiners who here join in the Marathon petition asserted that with respect to both controlled and uncontrolled petroleum products that it would be impossible to determine whether or not the refiners absorbed or passed on the overcharges.[51]

The refiners so argued because their position in the courts below was that the rule in antitrust damage suits under *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) should be applied by analogy. They argued that in providing a remedy under § 209, the District Court was bound to award restitution to the first purchaser without regard to actual injury, as TECA had done in certain circumstances in private § 210 damage suits. TECA rejected that restrictive view of § 209 (Exx. App. 90a) and the question presented in the Marathon petition does not challenge this basis for denying the refiners' claim. That is, of course, a separate and independent ground for denying the refiners' petition.[52]

2. The Gasoline Retailers present no question or argument relating to the fact that their motion to intervene

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[51] Brief of Intervenor-Appellants Marathon Petroleum Company, *et al.*, at 16-17. This statement by Marathon, *et al.* and that of another refiner which is not a petitioner here were cited by TECA in making the very ruling which the refiners now challenge. *See* Exx. App. 90a, quoted at p. 11, *supra.*

[52] In the closing footnote of their petition, the refiners say that, if the lower courts had applied the principles of the above-cited decisions, *"the impossibility of proving the absorption or pass on of overcharges in transactions subsequent to the first purchases* would have required the entire restitutionary award to be made to the first purchaser unless a showing was made that a subsequent purchaser had a fixed quantity cost plus contract or its functional equivalent." (Mar. Pet. 24, n.21, emphasis added). The underscored passage is consistent with the refiners' position below, but cannot be reconciled with the theory of their petition—that they are entitled to a hearing on whether it is "impossible".

was filed prior to the District Court's judgment.[53] Rather, their petition makes a more general point, applicable to all the parties which join therein, that, because the District Court had granted them intervention as a matter or right under Rule 24(a), it violated that Rule by denying them the opportunity to present evidence of their injury. ATA Pet. i, first question; 18-21.[54] This contention is a *non sequitur*, for Rule 24(a) contains within it the requirement that the motion to intervene as of right be "timely".

Here, all the motions which sought intervention for the *purpose of appeal* were timely for that purpose and were granted. On the other hand, neither the motion of the Gasoline Retailers nor that of the Indicated Refiners, which were filed prior to judgment but after oral argument on DOE and Exxon's motions for summary judgment, were timely for the purpose of requiring the District Court to reopen its proceedings. The indisputable fact is that from the very outset of this case it has been clear that the United States was seeking restitution in the form of a payment into the United States Treasury. (*See* Complaint quoted at p. 5, n. 15, *supra*). The movants did not suggest in the District Court—nor do they

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[53] The Retailers' motion to intervene was originally denied by the District Court on the basis of its finding that the real victims of the overcharges were the ultimate *consumers* of petroleum products. (Exx. App. 249a, n.56). It is significant that the petition for certiorari in which they joined contains nothing to show that any retailer can demonstrate injury as a result of Exxon's overcharges.

[54] The parties to the ATA petition other than the Gasoline Retailers cannot maintain that contention for the additional reason that they moved to intervene only for the purposes of appeal. They are thus making the unsupportable assertion that the District Court erred by denying them that for which they did not ask. Likewise, since *none* of the petitioners opposed the granting of summary judgment, in accordance with the procedures of Rule 56 or otherwise, the argument in the ATA petition, pp. 21-23, that their rights under Rule 56 were infringed is also untenable.

demonstrate now—that they had a right to wait until the proceedings before the District Court were virtually complete before seeking to make a record on their claims.

The position urged in the ATA petition would lead to the absurd result that where intervention is as of right, intervention may not be granted for purposes of appeal only. This Court has, however, approved intervention for purposes of appeal only, stressing that the propriety of such an appeal depends on "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977). *Cf. NAACP* v. *New York*, 413 U.S. 345, 366 (1973). In *McDonald*, intervention had been allowed under Rule 24(b), *see id.* at 390, but the Court there cited with approval a series of court of appeals decisions which allowed intervention for purposes of appeal only under Rule 24(a). (*Id.* at 395-396, n.16).[55]

No distinction between Rules 24(a) and (b) for this purpose has been proffered in the ATA petition, or readily suggests itself. If petitioners' submission were correct, a party whose interest is sufficient to allow intervention as of right and is timely for purpose of appeal could not be granted such intervention without being allowed to reopen the case in the trial court, even if its intervention is untimely for that purpose. Any such result would either defeat the right to intervene for purposes of appeal only or undermine the timeliness requirement of Rule 24(a).

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[55] These cases are: *Hodgson* v. *United Mine Workers*, 153 U.S. App. D.C. 407, 419, 473 F.2d 118, 129 (1972); *Smuck* v. *Hobson*, 132 U.S. App. D.C. 372, 378-379, 408 F.2d 175, 181-182 (1969); *Pellegrino* v. *Nesbit*, 203 F.2d 463, 465-466 (9th Cir. 1953); *Wolpe* v. *Poretsky*, 70 U.S. App. D.C. 141, 144, 144 F.2d 505, 508, *cert. denied*, 323 U.S. 777 (1944). The reports of the other cited cases do not state whether Rule 24(a) or (b) intervention was involved.

In sum, the prejudgment movants' procedural objections are no more worthy of review than those of the other petitioners, who intervened for purposes of appeal only.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

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(5) (4) (4) (3) (3)

Nos. 85-429, 85-430, 85-432, 85-440, and 85-444

In the Supreme Court of the United States

Supreme Court, U.S.
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OCTOBER TERM, 1985

EXXON CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

MARATHON PETROLEUM COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL, PETITIONERS

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EXXON CORPORATION AND UNITED STATES OF AMERICA

PHILADELPHIA ELECTRIC CORPORATION, PETITIONER

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NATIONAL FREIGHT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether crude oil price control regulations in effect between 1973 and 1981 required petitioner Exxon Corporation to calculate the amount of "new oil" at its Hawkins Field Unit by reference to the additional oil actually produced in the unit as a whole rather than by reference to production that Exxon shifted from one lease to another within the unit (No. 85-429).

2. Whether the regulations impermissibly discriminated between units formed at different times (No. 85-429).

3. Whether Exxon's suggested effective date for calculating new oil on a unit-wide basis was unreasonable as a matter of law (No. 85-429).

4. Whether Exxon was properly held liable for all of the crude oil overcharges that it caused (No. 85-429).

5. Whether the district court abused its discretion in ordering the restitution of crude oil overcharges through the States (Nos. 85-430, 85-432, 85-440, and 85-444).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
1. Regulatory background	2
2. Factual background	8
3. Proceedings below	11
Argument	15
Conclusion	35

TABLE OF AUTHORITIES

Cases:

American Farm Lines v. *Black Ball Freight Service*, 397 U.S. 532	21-22
Board of County Commissioners v. *United States*, 308 U.S. 343	25
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281	23
Bulzan v. *Atlantic Richfield Co.*, 620 F.2d 278	34
Capital Cities Cable, Inc. v. *Crisp*, No. 82-1795 (June 18, 1984)	22
Christmann & Welborn v. *DOE*, 773 F.2d 317, cert. denied, No. 85-81 (Oct. 15, 1985)	19, 25
Cities Service Co. v. *DOE*, 715 F.2d 572	32
Cities Service Co. v. *FEA*, 529 F.2d 1016, cert. denied, 426 U.S. 947	28
Citronelle-Mobile Gathering, Inc. v. *Edwards*, 669 F.2d 717, cert. denied, 459 U.S. 887	33
DOE v. *Louisiana*, 690 F.2d 180, cert. denied, 460 U.S. 1069	16, 22
DOE Stripper Well Exemption Litigation, In re, 578 F.Supp. 586	28
Exxon Corp. v. *DOE*, 744 F.2d 98, cert. denied, No. 84-188 (Dec. 3, 1984)	15
FPC v. *Interstate Natural Gas Co.*, 336 U.S. 577	33
Francis Oil & Gas, Inc. v. *Exxon Corp.*, 687 F.2d 484, cert. denied, 459 U.S. 1010	16
Grigsby v. *Doe*, 585 F.2d 1069, cert. denied, 440 U.S. 908	16

Cases—Continued: Page

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 29
Hecht Co. v. *Bowles*, 321 U.S. 321 28
Heckler v. *Campbell*, 461 U.S. 458 22-23
Heckler v. *Community Health Services*, No. 83-56 (May 21, 1984) 19
INS v. *Chadha*, 462 U.S. 919 15
Pennzoil Co. v. *DOE*, 680 F.2d 156, cert. dismissed, 459 U.S. 1190 .....4, 13, 16, 17, 19
Placid Oil Co. v. *FPC*, 483 F.2d 880, aff'd *sub nom. Mobil Oil Co.* v. *FPC*, U.S. 283 17
Porter v. *Warner Holding Co.*, 328 U.S. 395 .....28, 31, 33
SEC v. *Chenery Corp.*, 332 U.S. 194 22
SEC v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, cert. denied, 404 U.S. 1005 26
Sam Fox Publishing Co. v. *United States*, 366 U.S. 683 .. 32
Sauder v. *DOE*, 648 F.2d 1341 .....14, 25, 34
Schweiker v. *Hansen*, 450 U.S. 785 19
Tenneco Oil Co. v. *FPC*, 442 F.2d 489 26
Tully v. *Mobil Oil Corp.*, 455 U.S. 245 ..... 15, 26
Udall v. *Tallman*, 380 U.S. 1 18
United States v *Automobile Manufacturers Ass'n*, 307 F.Supp. 617, aff'd *sub nom. City of New York* v. *United States*, 397 U.S. 248 32
United States v. *Caceres*, 440 U.S. 741 21
United States v. *Lovasco*, 431 U.S. 783 16
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 23
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 23
Wisniewski v. *United States*, 353 U.S. 901 34

Constitution, statutes, regulations and rule:

U.S. Const. Amend. V (Due Process Clause) 32
Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note 2, 32
§ 209 .....32, 33, 34
§ 210 32
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* 3
15 U.S.C. 757(b)(2) 5

Constitution, statutes, regulations and rules—Continued: Page

Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.* 5

Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (Warner Amendment) 31

6 C.F.R.:

Pt. 150, Subpt. L (1974) 2

Section 150.354 (1974) 2, 3

10 C.F.R.:

Pt. 212, Subpt. D. (1975) 2

Section 212.72 (1975) ..... *passim*

Section 212.75 (1977) 6, 7, 8, 10, 12, 14, 21, 22

Fed. R. Civ. P. 56 23

Miscellaneous:

128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) 31

38 Fed. Reg. (1973):

p. 22536 2

p. 22538 3

pp. 22538-22543 2

39 Fed. Reg. (1974):

p. 1924 2

p. 1952 ..... 2, 3

40 Fed. Reg. 40832 (1975) 4, 5

41 Fed. Reg. (1976):

p. 4920 3

p. 4931 ..... 3, 5, 20

pp. 4936-4937 6

p. 4937 ..... 5, 6, 7, 20

p. 4938 ..... 3, 6

p. 4940 4

p. 4941 6

p. 36172 ..... 7, 22

p. 36184 ..... 7, 22

42 Fed. Reg. (1977):

p. 4409 7

p. 4414 8

p. 4415 8

p. 23723 4

p. 23726 4

p. 23730 4

p. 23740 4

p. 25659 4

S. Rep. 94-1119, 94th Cong., 2d Sess. (1976) 31

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-429

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UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-172a) is reported at 773 F.2d 1240. The opinion of the district court (Pet. App. 173a-268a) is reported at 561 F.Supp. 816.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1985, and petitions for rehearing were denied on August 15, 1985 (Pet. App. 269a-270a). The petitions for a writ of certiorari in Nos. 85-429 and 85-440 were filed on September 13, 1985. The petitions for a writ of certiorari in Nos. 85-430, 85-432, and 85-444 were filed on September 14, 1985. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.

STATEMENT

1. *Regulatory background. a.* In 1973, a predecessor agency to the Department of Energy (DOE)[2] promulgated Phase IV price controls for domestic crude oil pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. See 6 C.F.R. Pt. 150, Subpt. L (1974), 38 Fed. Reg. 22536, 22538-22543 (1973); see also 10 C.F.R. Pt. 212, Subpt. D (1975), 39 Fed. Reg. 1924, 1952 (1974) (regulations as repromulgated under the

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[1] "Pet." and "Pet. App." refer to the petition and appendix in No. 85-429.

[2] Hereafter, we will use DOE to refer to its predecessor agencies as well as to the Department itself. The various agencies are set forth in *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983). See Pet. App. 8a n.4, 173a n.1.

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*). These controls instituted a two-tier pricing mechanism designed to dampen the inflationary spiral in crude oil prices without eliminating economic incentives for increasing domestic production. See Pet. App. 9a, 175a, 206a.

The "primary statutory mandate [was] to hold down prices of crude oil" by setting a ceiling for the price of domestic oil which was already being produced, referred to as "old oil." Pet. App. 197a. Old oil was defined as the monthly production from a property that did not exceed the property's "base production control level" (BPCL), which was its production for the same month in 1972. Production in excess of the property's BPCL was deemed "new oil" that could be sold at prices above the controlled price for old oil, thus avoiding any disincentive for producers to discover new sources of oil and to increase the amounts of oil recovered from properties already in production. See *id.* at 9a, 196a; 6 C.F.R. 150.354 (1974), 38 Fed. Reg. at 22538; 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952.

Central to the two-tier system was the definition of the "property" for which the BPCL and current production were calculated. See 41 Fed. Reg. 4931, 4938 (1976). The regulations defined property as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952 (repromulgating 6 C.F.R. 150.354 (1974)).[3] Left to their own devices, producers might seek to " 'obtain higher prices by arranging production in such a way as to shift oil into the "new" category to the maximum extent possible.' " Pet. App. 197a (citation omitted). Accordingly, the defini-

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[3] In 1976, Section 212.72 was "grammatically altered" (Pet. App. 177a n.5) "without substantive change" (*id.* at 9a) to define property as "the right to produce domestic crude oil, which arises from a lease or from a fee interest." 41 Fed. Reg. at 4920.

tion of property in Section 212.72 was intended to be interpreted in light of DOE's " 'duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls.' " *Ibid.* (citation omitted).

b. This case arises out of DOE's interpretation of its definition of property, and hence its determination of the proper amount of new oil produced, with respect to unitized crude oil producing properties formed after 1972, the base year for computing the BPCL. Unitization is a "cooperative production process" for "large, multilease tracts which * * * [fomerly] operated as independent, competing properties." Pet. App. 177a. Under a "Unit Agreement," the "previously competing leaseholders * * * group their interests and form a single unit comprising all of the interests in the single reservoir of oil," which permits "enhanced recovery efforts [that] cause oil to flow underground across lease lines." *Id.* at 178a n.6. Following unitization, production from many wells is typically reduced or eliminated altogether while production from other wells within the unit is substantially increased. *Id.* at 15a, 178a n.6; 40 Fed. Reg. 40832 (1975).

DOE consistently interpreted the definition of property in Section 212.72 to require that the amount of new oil produced at units formed after 1972 be determined on a unit-wide basis, *i.e.*, by comparing the current monthly production from the unit with a BPCL consisting of the total amount produced during the same month in 1972 from all of the leases comprising the unit. See Pet. App. 10a; *Pennzoil Co.* v. *DOE*, 608 F.2d 156, 162-163 & n.11 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).[4] The agency published this position in Ruling 1975-15, 40 Fed. Reg. 40832 (1975), where it stated that a unit's "BPCL is the total 1972 monthly production from

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[4] Certain of these interpretations, Nos. 1974-22, 1975-2, 1975-4, 1975-10, and 1975-27, were later published at 42 Fed. Reg. 23723, 23726, 23730, 23740, 25659 (1977). See Pet. App. 10a, 178a n.7.

all of the several leases that now comprise the unit." This approach was "dictated * * * by the need to compare like quantities, [during and after] 1972, in order to ensure a meaningful application of the new [oil]" provisions. *Ibid.* Otherwise, the "distorted actual production from any one lease comprising the unit" (*ibid.*; emphasis omitted) resulting from the shifts in production that normally accompany unit-wide production would allow producers to take advantage of the higher prices permitted for new oil far beyond the actual increase, if any, in their production of oil. As DOE explained, "the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual increases in production from those leases since the base period." 41 Fed. Reg. 4931, 4937 (1976). For these reasons, the agency concluded that "the unit agreement signifies one right to produce crude oil" and that "the unit [therefore] defines the property" under Section 212.72 of the regulations. 40 Fed. Reg. at 40832. See Pet. App. 10a, 177a-179a.

c. In December 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*, in light of changes in the condition of the nation's oil supplies. The statute permitted for the first time "price increases, without current increases in production, when the agency found that such price increases would give incentives for 'enhanced recovery techniques.' " Pet. App. 10; see *id.* at 179a-180a.[5] In response to the new statute and industry comments, in February 1976 DOE promulgated a new regulation effective prospectively from

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[5] Absent such circumstances, Congress specifically prohibited regulatory changes permitting "an increase in the price for any volume of old crude oil production." 15 U.S.C. 757(b)(2). See Pet. App. 179a-180a.

February 1, 1976, 10 C.F.R. 212.75 (1977), 41 Fed. Reg. at 4941. Section 212.75 provided that a "producer shall, as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substantially altered (whichever date occurs first), establish a unit base production control level for the unit." Before that time, meaningful lease-by-lease comparisons would still be possible, and delaying implementation of the unit-wide BPCL would remove certain "disincentive[s] to the *prospective* unitization of properties." 41 Fed. Reg. at 4938 (emphasis added); see also *id.* at 4936-4937. The regulation defined "enhanced recovery" as "any method * * * of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." [6]

DOE also applied its more lenient approach toward unitized properties to existing units subject to Section 212.72 by rescinding ab initio "[t]hat limited portion of [Ruling 1975-15] which require[d] the producer *as of the effective date of unitization* to total all the BPCL's of participating leases and to treat the unit as a single property." 41 Fed. Reg. at 4937 (emphasis added). The agency reaffirmed the basic principle of Ruling 1975-15, embodied in 6 C.F.R. 212.72 (1975), that unitization normally requires unit-wide production comparisons in order to determine the true incremental increase in oil production; it concluded, however, that calculation of a unit-wide BPCL need not in every instance take place immediately upon unitization. 41 Fed. Reg. at 4937. Rather, DOE deter-

[6] The agency "ma[de] it clear" that its definition of enhanced recovery "would apply * * * so long as the '*energy employed* to move the crude oil through the reservoir is applied from extraneous sources.' The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source." 41 Fed. Reg. at 4938 (emphasis in original).

mined that a unit-wide BPCL need be implemented only after "there has been a significant alteration in pre-unitized producing patterns of the individual leases" or "enhanced recovery operations [have begun]." *Ibid.*; see generally Pet. App. 11a-12a, 180a-181a. The agency stated that at a later time it would further clarify the standard of a significant alteration in production patterns beyond its extensive reference in the preamble to the necessity for adopting a unit-wide BPCL where a meaningful comparison of pre- and post-base level production would not be possible on a lease-by-lease basis. 41 Fed. Reg. at 4937; see also 41 Fed. Reg. 36172, 36181 (1976). See generally Pet. App. 10a-12a, 180a-182a.

d. After receiving comments on the issue, DOE amended Section 212.75 in August 1976 to define "significant alteration in producing patterns" as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables [*i.e.*, maximum permitted production levels] for any property that constitutes the unitized property." 41 Fed. Reg. 36172, 36184. Once either of these events occurred, the BPCL was required to be calculated on a unit-wide basis. *Ibid.* At the same time, the agency further amended Section 212.75 "to eliminate any remaining disincentive to producers of new crude oil to enter unitized properties" by granting them the benefit of "imputed new oil," which ensured that newly formed units would be permitted to sell at least as much new oil as they had produced before unitization. 41 Fed. Reg. at 36182; see *id.* at 36184. See generally Pet. App. 12a, 182a.

e. In response to further comments, the agency clarified its amended Section 212.75 in Ruling 1977-2, issued in January 1977. 42 Fed. Reg. 4409. This ruling made clear that "Section 212.75, adopted on February 1, 1976, is applicable only to enhanced recovery unitized properties which established a unit BPCL on or after February 1,

1976." *Id.* at 4415. Units formed prior to that date, by contrast, were governed by Section 212.72, as reflected in Ruling 1975-15 (as modified on February 1, 1976). *Ibid.* The later definition of "significant alteration in producing patterns" promulgated in August 1976 would "be considered as guidance" with respect to determining the date on which a unit BPCL would be required for these earlier-formed units. *Ibid.* Producers would be permitted to attempt "to justify the establishment of the date of significant alteration in producing patterns" on other reasonable grounds "on a case-by-case basis." *Ibid.* DOE also explained that the special incentive of "imputed new oil" provided in the amendment to Section 212.75 effective September 1, 1976, was available only for units undergoing a significant alteration on or after that date. 42 Fed. Reg. at 4414. See Pet. App. 12a, 182a-183a.

2. *Factual background.* a. Oil was discovered in the Hawkins Field in Texas in 1940. Within a decade, more than 200 companies and individuals were producing oil on more than 300 leases in the field; by 1969, petitioner Exxon Corporation[7] owned two-thirds of the field's production. The Texas Railroad Commission regulated the competitive production of oil from Hawkins Field by setting "production allowables" limiting the amount of oil that could be produced from each well. The Commission also established a "maximum efficient rate of production" (MER), which limited the volume of oil that could be pumped from the field as a whole each day. Under the Commission's MER rules, any shortfall in a lease's daily production under its allowable was distributed pro rata to all of the other capable leases in the field in order to allow total production to remain at the MER level. Pet. App. 14a-15a, 183-184a.

Several years before the promulgation of crude oil price

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[7] Unless otherwise stated, we will use "petitioner" to refer to Exxon Corporation.

control regulations, petitioner and other owners of interests in Hawkins Field recognized the need to initiate enhanced recovery operations in order to arrest the decline in natural reservoir pressure that had occurred over the years and thereby to prolong the life of the field. In 1969, petitioner began to promote unitization of the field, which would spread the cost of recovery operations and permit the use of techniques that would move oil across lease lines. In preparation for unitization, the Commission authorized petitioner in 1969 to conduct a limited interim gas injection project and significantly increased the field's daily MER allowable. Pet. App. 15a-16a, 184a-185a.

During the extensive negotiations leading to a unit agreement, petitioner projected a net after-tax profit for the interest owners resulting from unitization of more than $250 million. This figure was based on an oil price substantially below the price at which *old* oil eventually sold under price controls. The unit agreement, ultimately signed in 1974, provided that petitioner would operate the unit beginning on January 1, 1975. Pet. App. 16a, 185a; R. 23881-23882, 24057, 24128-24130.

b. Following the promulgation of price controls in 1973, petitioner issued instructions to its employees requiring that each of its multi-lease units, including those (like Hawkins Field) formed after 1972, must be treated as a single property for price regulation purposes, and petitioner in fact followed those instructions at other post-1972 units. Pet. App. 16a-17a, 186a-187a. In July 1974 petitioner informed other Hawkins Field interest owners that, "[a]fter unitization, the field is treated as a single lease and exempt [*i.e.*, new] oil is calculated on a total field basis." R. 24366. As petitioner explained, this would result in "much less exempted oil volume than under nonunit operation." R. 24375; see also R. 24379, 24385. Notwithstanding the smaller amount of new oil that would be available under the unit price rule, 98.5% of

the working interest owners in Hawkins Field and 82% of its royalty interest owners had signed the unit agreement as of early August 1974. R. 24411; see also R. 18013-18014.

c. Shortly before unitization became effective, however, petitioner decided to depart from its prior representations to the Hawkins Field interest owners and from its pricing practices at other unitized fields by announcing that it would continue lease-by-lease accounting at Hawkins Field following unitization. Pet. App. 17a, 187a-188a. Once unitization began, petitioner was permitted by the state regulatory agency "to transfer production among wells within the unit, *at will.*" *Id.* at 16a (emphasis in original). Petitioner immediately took advantage of this new flexibility by shutting in more than 20% of the unit's wells, which enabled it to reduce production at 137 leases by nearly 320,000 barrels and to increase production by an equal amount at 65 other leases. *Id.* at 46a. Petitioner also substantially increased the volume of gas that it injected into the field. *Id.* at 49a-50a, 230a-231a.

In light of petitioner's continued lease-by-lease accounting following unitization, its transfer of production among leases "resulted in substantial increases in 'new' oil, without any actual increase in total production from the field." Pet. App. 46a. Petitioner "doggedly persisted, even in the face of the pellucid dictates of Ruling 1975-15, in applying individual lease accounting at the Hawkins Field." *Id.* at 234a (footnote omitted). It did not adopt a unit-wide BPCL until September 1, 1976. When it did so, petitioner performed its calculations under the more generous provisions of Section 212.75 of the regulations rather than under Section 212.72, even though the agency consistently had determined—and made explicit in January 1977—that Section 212.75 did not apply to units such as Hawkins Field that were formed prior to February 1976. Pet. App. 18a, 190a. Petitioner continued accounting on this basis until decontrol in 1981. Despite a "steady

decline in production" at Hawkins Field during the period that controls were in effect, petitioner's pricing practices ensured that "an *increasing* percentage of oil was accounted for by [petitioner] as upper-tier, higher-priced oil, until beginning June 1, 1979, almost all of the [production] was classified as new oil." *Id.* at 190a (emphasis added).

3. *Proceedings below.* a. The United States filed this action in the United States District Court for the District of Columbia, seeking restitution from petitioner of the overcharges that it caused by improperly computing the amount of new oil produced at Hawkins Field.[8] On cross-motions for summary judgment, the district court denied petitioner's motion and granted the government's motion to require restitution of all overcharges with interest. Pet. App. 173a-268a. The district court held that Section 212.72 of the regulations required the adoption of a unit-wide BPCL immediately upon unitization and that petitioner suffered no prejudice from application of the less stringent "significant alteration" test as "guidance" for determining the date at which calculation of such a BPCL was required. *Id.* at 206a-210a, 213a-214a. The district court rejected petitioner's contention that the government was estopped from enforcing its regulations, noting that "a regulated party as sophisticated as [petitioner]" could not reasonably "ignore[ ] the only existing official pronouncements" in favor of "unauthorized views of agency employees ferretted out by [petitioner] which happen to coincide with [its] self-interest." *Id.* at 234a.

The district court also determined that DOE's "sliding scale of incentives, though complex, reasonably carried

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[8] The government also sought civil penalties. The district court declined to assess a penalty, noting that while petitioner "ignor[ed] the unequivocal dictates" of the regulations, it "accurately represented its conduct to the agency." Pet. App. 260a. The government did not prosecute an appeal from this ruling. *Id.* at 5a.

out the conflicting objectives" of holding down prices while increasing production. Pet. App. 220a n.37. Accordingly, the agency did not act improperly in offering special benefits, such as imputed new oil, to producers that, unlike petitioner, had not found unitization economically attractive without those benefits. *Id.* at 214a-221a. "In refusing to go further and to extend greater benefits to pre-existing units" such as Hawkins Field, the district court reasoned, "the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Id.* at 220a. The district court also noted the "puzzling" nature of petitioner's attacks on Section 212.75, since even if that regulation were invalidated, Section 212.72, which set forth the definition of "property," nonetheless required implementation of a unit BPCL at Hawkins Field as of January 1, 1975. Pet. App. 227a n.39.

Giving petitioner the benefit of the relaxed requirement of Ruling 1977-2, and applying as guidance the definition in Section 212.75, the district court ruled that a unit BPCL was required under that definition as well on January 1, 1975, because a "significant alteration in producing patterns" occurred as of that date. Pet. App. 221a-231a. The district court reached this result in view of the increased injections of gas, increases in production allowables, and substantial transfer of production among leases that occurred simultaneously with unitization. The district court also concluded that, as a matter of law, petitioner had not offered any basis for the choice of a reasonable alternative date on which to begin unit-wide accounting. *Id.* at 226a-227a n.38.[9] Petitioner's reliance on the testimony of

[9] The district court addressed this issue even though petitioner had not actually contended that its evidence established a reasonable alternative date within the definition set forth in the regulations and the question therefore was "not before the court." Pet. App. 226a n.38; see also *id.* at 52a-53a & n.26.

petroleum engineers with respect to the underground drive mechanism of the Hawkins Field reservoir would be unworkable, the district court found, because it would substitute "hard to decipher underground phenomena" for the "clear, easily administered test" adopted by DOE. *Id.* at 222a.

Finally, the district court held petitioner liable for the full amount of the overcharges from Hawkins Field because petitioner had caused those violations of the law by its pricing and production decisions as operator of the unit. Pet. App. 239a-259a. In light of the impossibility of identifying the ultimate victims of petitioner's actions, the district court exercised its equitable powers to order the funds to be deposited in an escrow account for distribution to the states in connection with specified energy conservation programs. *Id.* at 255a-256a.[10]

b. The court of appeals affirmed. Pet. App. 1a-172a.[11] Relying on its decision in *Pennzoil Co.* v. *DOE, supra,* the court of appeals held that Section 212.72 "required the establishment of a single BPCL upon unitization of the Hawkins Field." Pet. App. 29a. It further noted that Ruling 1975-15, which made this interpretation explicit, was later only partially rescinded and that the agency's focus remained on "the fact that lease-by-lease accounting was not permissible after some alteration in production methods precluded any 'meaningful comparison' of current and base period production." *Id.* at 30a.

The court of appeals agreed with the district court that, even under the relaxed application of Section 212.72 and

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[10] In view of the fact that the judgment was only a small fraction of petitioner's net worth, the district court relieved petitioner of the requirement that it post a bond pending appeal. See R. 31664.

[11] The panel was unanimous with respect to petitioner's liability. Judge Becker dissented in part solely on the ground that persons claiming to be actual victims of petitioner's overcharges should have been afforded an opportunity to prove the fact and amount of their damages. Pet. App. 93a-172a.

the significant alteration test, petitioner was required to adopt a unit BPCL for Hawkins Field as of January 1, 1975. *Id.* at 30a-39a, 43a-51a. The court of appeals rejected petitioner's contention that Hawkins Field never would have been unitized had the owners known that a unit BPCL was required, noting that petitioner "was well aware that Section 212.72 required adoption of unit-wide accounting upon unitization." *Id.* at 40a.[12] The court of appeals also concluded that the special benefits for prospective unitization provided in Section 212.75 were not arbitrary. *Id.* at 41a-43a.

The court of appeals rejected petitioner's argument that it had established a reasonable alternative basis for unit-wide accounting for two reasons. First, "any meaningful comparison of production levels between 'old' and 'new' oil on a lease-by-lease basis became impossible once production across lease lines began in January, 1975." Pet. App. 53a. Second, "any resort to the testimony of expert petroleum engineers * * * would be unworkable, and therefore, not a reasonable basis for determination of the question." *Id.* at 54a-55a.

Relying on its decision in *Sauder* v. *DOE*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981), the court of appeals agreed with the district court that petitioner was liable for all of the overcharges from the unit because "[t]he undisputed evidence" (Pet. App. 57a) demonstrated that petitioner caused those overcharges. *Id.* at 55a-61a. The court of appeals also held that the district court had properly exercised its equitable discretion in requiring petitioner to pay the full amount of the overcharges in view of petitioner's failure to follow the clear commands of the regulations. *Id.* at 76a-77a. Finally, the court of appeals upheld the

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[12] Unitization was attractive even under the unit BPCL requirement because it made possible the production of more oil for the unit as a whole than if the owners had continued competitive production and lease-by-lease accounting. See Pet. App. 40a; see also Pet. 2.

district court's order concerning disposition of the judgment. *Id.* at 78a-92a; see note 11, *supra.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The Temporary Emergency Court of Appeals decided a narrow issue of regulatory construction under a program of emergency price controls that has long since expired and is of no continuing importance. As this Court has noted, Congress established TECA in order to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully considered the arguments presented in the petitions, and it rejected them in a thoughtful decision.[13] In these circumstances, further

[13] Petitioner Exxon's renewal (Pet. 27 n.24) of its prior attack (84-1142 Pet. 9-11) on the integrity and impartiality of the judges designated by the Chief Justice to serve on TECA is unwarranted and disrespectful of the judges who devote their time and energy to serving on that court. Petitioner's specious and impertinent claim that TECA's supposed partiality is "widely recognized" is not corroborated by the references on which it relies. Moreover, petitioner fails to support the implication of its allusion to the government's success in cases before TECA—*i.e.*, that those cases were wrongly decided. Rather, the outcome of cases in TECA reflects the insubstantial nature of many of the arguments raised in opposition to DOE positions, something further illustrated by Exxon's petition in this case. We note that our own informal survey indicates that the other courts of appeals have decided approximately 90% of appeals relating to the Emergency Petroleum Allocation Act on the merits in favor of the government. Finally, petitioner's characterization of TECA's treatment of the applicability of *INS* v. *Chadha*, 462 U.S. 919 (1983), to the price control program as "cavalier[]" (Pet. 39 n.33) is disingenuous at best. As petitioner well knows, that issue had already been conclusively decided against it by TECA in the court of appeals' comprehensive opinion in *Exxon Corp.* v. *DOE*, 744 F.2d 98 (1984), cert. denied, No. 84-188 (Dec. 3, 1984), and it therefore warranted little discussion here.

review is not warranted.[14]

1. Petitioner argues first (Pet. 27-29, 29-32)[15] that the regulations did not require it to adopt a unit-wide BPCL for Hawkins Field as of January 1, 1975. This argument is completely without merit.

a. The definition of property contained in Section 212.72 was promulgated by the agency in 1973. TECA has consistently held that that regulation, in itself, required the adoption of a unit BPCL immediately upon unitization. See *Pennzoil Co.* v. *DOE,* 680 F.2d 156, 168 (1982), cert. dismissed, 459 U.S. 1190 (1983); *Francis Oil & Gas, Inc.* v. *Exxon Corp.,* 687 F.2d 484, 488, cert. denied, 459 U.S. 1010 (1982); *DOE* v. *Louisiana,* 690 F.2d 180, 190 (1982), cert. denied, 460 U.S. 1069 (1983); *Grigsby* v. *DOE,* 585 F.2d 1069 (1978), cert. denied, 440 U.S. 908 (1979). As TECA explained in *Pennzoil* (680 F.2d at 168):

> "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." [Citation omitted.]

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[14] Contrary to its repeated suggestions (Pet. i, 1, 2, 25, 42), the mere monetary size of petitioner's violations does not entitle it to further review in the absence of a legal issue of sufficient general significance to warrant this Court's attention. We note also that the constitutional garb in which petitioner dresses what are at bottom mundane challenges to an agency's exercise of discretion and interpretation of its own regulations was donned fairly late in the day. In almost 200 pages of briefs in the court of appeals, petitioner mentioned due process only twice. Cf. Pet. 2, 25, 26, 29, 31 n.29, 32, 42. Not until its petition for rehearing did petitioner expressly make its primary argument in constitutional terms, and then only very briefly (at 25-26). Thus petitioner "continues to shift ground" in this Court just as it did below. Pet. App. 53a n.28; see *id.* at 32a. See generally, *e.g.*, *United States* v. *Novasco,* 431 U.S. 783, 788 n.7 (1977).

[15] Petitioner Exxon attacks only the finding of liability (questions 1-4). The petitioners in Nos. 85-430, 85-432, 85-440, and 85-444 support the finding of liability and seek review only of the question whether the district court abused its discretion in ordering that the judgment fund be distributed through the several States (question 5). These issues are completely independent.

> The application of this definition to unitized properties plainly contemplates a single "property" or right to produce arising from the several leases or fee interests constituting the unit.
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> * * * * *
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> [I]f upon unitization the "property" is no longer defined by each individual lease but by the unit as a single right to produce, it seems rather obvious that current production of the "property" after unitization must include all production from all of the leases within the unit.

Thus, even if DOE had done nothing further, Section 212.72 alone—which is how the regulations stood at the time that petitioner formed the unit and made its pricing decisions—required petitioner to adopt a unit BPCL for Hawkins Field on January 1, 1975. Pet. App. 38a.

Petitioner makes three responses.[16] First, it contends that the language of Section 212.72 required lease-by-lease accounting at unitized properties. Pet. 6, 27-28. This argument misreads the "plain language of the definition" and would in effect completely rewrite it. *Pennzoil,* 680 F.2d at 169; see *id.* at 168; Pet. App. 27a-29a. Moreover, it rests, like much of petitioner's argument (*e.g.*, Pet. 2, 9, 41), on an unreasonable and one-sided view that the overriding purpose of the price control regulations was to encourage production. As the courts below made clear, that goal was

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[16] All of these responses miss the point that petitioner's liability rested on its failure to satisfy the more lenient "significant alteration in production" standard of Ruling 1977-2 rather than the immediate unit-wide BPCL requirement of Ruling 1975-15. See Pet. App. 38a, 43a-51a. That petitioner was unable to qualify for the benefits provided by the more lenient standard is no reason to invalidate the agency's construction of its own regulations, which plainly were not intended to provide benefits to all units regardless of circumstances. Cf. *Placid Oil Co.* v. *FPC,* [illegible] F.2d 880, 905 (5th Cir. 1973), aff'd *sub. nom. Mobil Oil Co.* v. *FPC,* 417 U.S. 283 (1974).

only one of several and scarcely could be given controlling weight in disregard of the fundamental purpose of directly limiting the price increases that were plaguing the nation. See Pet. App. 9a, 175a, 197a, 206a.[17] Petitioner's reading of the regulation would utterly have failed to advance this purpose in a sensible fashion, for it would have allowed the creation on paper of new, higher-priced oil simply by shuffling production from one well to another without any actual increase in production. See pages 3-5, 10-11, *supra*. Indeed, it would have permitted crude oil producers to escape price controls altogether merely by joining forces with their neighbors and pumping all of their joint production out of one well rather than two. Finally, petitioner fails to give due deference to DOE's own interpretation, adopted in several contemporaneous rulings, that Section 212.72 required a unit BPCL immediately upon unitization, an interpretation faithful to the language of the regulation and to the underlying statutory and regulatory purposes. See, *e.g.*, Pet. App. 196a-197a; *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965) (citation omitted) (" '[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ").[18]

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[17] One searches in vain through the 42-page petition for even an acknowledgement that one purpose of price controls was to control prices.

[18] The fact that several of the interpretations (unlike Ruling 1975-15) were not published in the Federal Register until 1977 (see note 4, *supra*) does not detract from their probative value in demonstrating the agency's view of what its own regulations required. Of course petitioner could not have been bound by unpublished rulings; the point, however, is that the validly promulgated and published regulation itself required the practice that petitioner refused to adopt. In view of both Ruling 1975-15 and the agency's other contemporaneous interpretations of Section 212.72 to require a unit BPCL immediately upon unitization, petitioner's characterization of this understanding of the regulation as a "later *post hoc* rationalization[] of the agency's litigation attorneys" (Pet. 28 n.26) is contrary to fact.

Second, petitioner appears to suggest (Pet. 28 n.27, 41), although it avoids directly invoking the doctrine, that the government should, in effect, be estopped from enforcing Section 212.72 on the basis of alleged informal oral advice by some agency employees that lease-by-lease accounting of unitized properties was permissible, an argument that petitioner waived in the court of appeals. See Pet. App. 77a-78a n.41. Consistently with this Court's rulings, TECA has repeatedly held, as it did here, that the views of individual officials could not reasonably be relied on as those of the agency and cannot estop the government from enforcing the law. See Pet. App. 33a-34a; *Christmann & Welborn* v. *DOE,* 773 F.2d 317 (1985), cert. denied, No. 85-81 (Oct. 15, 1985); *Pennzoil Co.* v. *DOE,* 680 F.2d at 171-172. See generally, *e.g., Heckler* v. *Community Health Services,* No. 83-56 (May 21, 1984); *Schweiker* v. *Hansen,* 450 U.S. 785 (1981). In any event, it is quite plain that petitioner did not rely on such advice in embarking upon unitization at Hawkins Field, for petitioner obtained the agreement of the other interest owners on the assumption that unit-wide accounting would be required, and it followed that practice at its other units as well. See pages 9-10, *supra.*[19]

Third, petitioner argues that DOE's partial rescission of Ruling 1975-15 in February 1976 vitiates all reliance on the agency's interpretation of Section 212.72 to require unit-

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[19] Without pausing to acknowledge the findings of the courts below, petitioner baldly asserts that Hawkins Field never would have been unitized had the interest owners known that a unit BPCL was required. Pet. 5-6, 31. The court of appeals expressly rejected this speculation (Pet. App. 40a), and it defies common sense as well as the factual record. Petitioner and the other Hawkins Field interest owners were quite obviously far better off financially once the reservoir was unitized even with the unit BPCL required by Section 212.72 because unitization allowed the production of substantially greater quantities of oil than would otherwise have been possible. See Pet. App. 15a, 40a-41a, 208a-209a n.30.

wide BPCLs. Pet. 27-29. In making this argument, petitioner completely misconstrues DOE's February 1976 ruling. The agency reaffirmed the principle of Section 212.72 and Ruling 1975-15 that unitization normally requires the adoption of a unit BPCL because lease-by-lease comparisons of production are no longer meaningful. 41 Fed. Reg. 4931, 4937 (1976). However, because it recognized that production patterns are not in every case realigned simultaneously with unitization, the agency relaxed the requirement that producers adopt a unit BPCL immediately upon unitization in favor of the "significant alteration in producing patterns" standard, which both was more sensitive to the changes that necessitated adoption of a unit BPCL and increased the incentives for unitization. See Pet. App. 30a-31. The result was a less stringent application of Section 212.72. But the agency most emphatically did not establish the propriety of the lease-by-lease accounting practices followed by petitioner, which resulted in increasing amounts of new oil being reported even as actual production declined. *Id.* at 190a.[20]

[20] The agency made this clear at the time (41 Fed. Reg. at 4937):

> [I]n determining quantities of new * * * crude oil from a unit under the prior regulations, Ruling 1975-15 required that current total production from the unit exceed the total base production control levels for all the participating properties of the unit before any of the unit production qualifies as new crude oil.
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> This result is dictated by the need to compare current production levels with like quantities of base production control levels in determining whether there has been an increase in production above base period levels. * * * [A] meaningful comparison could not ordinarily be obtained where current production figures from individual leases are compared with BPCL's from those leases, once there has been a realignment of producing patterns such as normally accompanies enhanced recovery. Thereafter, the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual

b. Petitioner argues as well (Pet. 29-31) that the new standard for determining the date for calculating new oil on a unit-wide basis embodied in the definition used in Section 212.75 could not be applied retroactively to Hawkins Field.[21] As both courts below noted, the argument is a curious one because invalidation of Section 212.75 would leave petitioner in no better position: it would still have been required to adopt a unit BPCL on January 1, 1975 under Section 212.72, as just discussed. Pet. App. 32a, 227a-228a n.39. In any event, retroactive application of the definition used in Section 212.75 is unobjectionable because it did not prejudice petitioner. Cf. *United States* v. *Caceres*, 440 U.S. 741, 752-753 & n.15 (1979); *American Farm Lines* v. *Black Ball Freight Serv-*

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increases in production.

> * * * [U]ntil such time as there has been a significant change in producing patterns, [however,] there is no reason for the unit operator to depart from the historical practice of determining quantities of new crude oil on a lease-by-lease basis.
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> * * * Once enhanced recovery operations begin [or producing patterns are significantly altered before the actual implementation of enhanced recovery operations], the producer will be required to calculate a unitized BPCL * * *.

[21] Petitioner appears at times to suggest that even under the definition set forth in Section 212.75 or some ill-defined "generic standard," a significant change in producing patterns did not take place on January 1, 1975. See, *e.g.*, Pet. 23 n.21, 32 n.29. However, the record clearly establishes the extent to which petitioner shifted production among leases as of that date, thereby rendering meaningful lease-by-lease comparisons—the only possible "generic" touchstone—impossible. See page 10, *supra*. Moreover, it is undisputed that production allowables and gas injections increased, thereby triggering a unit BPCL requirement under the regulatory definition (contrary to petitioner's contention, the regulations did not require that the injected gas be obtained from sources outside the reservoir, see note 6, *supra*). It would, indeed, have been flatly inconsistent with the statutory purpose for the agency to have permitted the wholly illusory creation of higher-priced new oil for which petitioner argues. See Pet. App. 43a-51a (finding as a matter of law that a significant alteration of producing patterns occurred at Hawkins Field on January 1, 1975).

ice, 397 U.S. 532, 539 (1970); see generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). Ruling 1977-2, using the definition in the new Section 212.75, was more favorable to producers than Ruling 1975-15, which strictly applied the old Section 212.72. Moreover, in making its decision to unitize, petitioner relied only on the less favorable prior standard requiring the immediate adoption of a unit BPCL. Pet. App. 38a-41a; see pages 9-10, *supra.*

2. Petitioner argues next (Pet. 32-35) that the additional incentives for unitization provided by the regulations for units formed after February 1976 were irrational. The courts below thoroughly discussed and correctly rejected this contention. Pet. App. 41a-43a, 214a-221a. As the district court noted, petitioner merely "seeks to wage the battle it lost when Section 212.75 was promulgated." *Id.* at 220a. DOE "performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Ibid.* The differing incentives available to units that were formed at different times or not yet formed reasonably balanced the conflicting goals of increasing production and holding down prices by offering additional benefits only to those producers for whom unitization would not otherwise have been profitable. See *DOE* v. *Louisiana,* 690 F.2d at 189. The purpose of Section 212.75 was "to remove any * * * regulatory impediments to the *formation* of units." 41 Fed. Reg. 36172, 36182 (1976). Since it was unnecessary to encourage something already accomplished, it was completely reasonable not to apply the incentive provisions of Section 212.75 to pre-existing units such as Hawkins Field. TECA, which has special expertise in this area, found no basis for setting aside the agency's exercise of discretion. There is no basis (or need, given the fact that the regulations have expired) for this Court to do so either. See generally, *e.g., Capital Cities Cable, Inc.* v. *Crisp,* No. 82-1795 (June 18, 1984), slip op. 15; *Heckler* v.

Campbell, 461 U.S. 458, 466 (1983); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).[22]

3. Petitioner argues next (Pet. 35-38) that it was denied an opportunity to present a reasonable alternative basis for beginning unit-wide accounting at Hawkins Field. Apparently, petitioner relies on the testimony of "fourteen petroleum engineering experts" concerning the underground drive mechanism of the reservoir and concluding that the most significant change occurred with the injection of inert gas beginning in 1977. See Pet. 17 n.15. Petitioner's argument misses the point. Both courts below fully credited petitioner's evidence. They properly concluded, however, that there was no factual dispute to be decided because petitioner's proferred alternative date was unreasonable as a matter of law. Pet. App. 52a-55a, 226a-227a n.38. Accordingly, no factual hearing was required. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973).[23]

The unreasonableness of petitioner's suggested date is apparent at once. Petitioner extensively realigned production patterns at Hawkins Field beginning on January 1, 1975. See page 10, *supra*; Pet. App. 46a, 228a-229a. As the district court explained, petitioner's "own measurements and analysis of production shifts at Hawkins Field show[ed] the dramatic changes that occurred in 1975," in-

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[22] In any event, as the courts below noted, petitioner's attack, if successful, would result only in the invalidation of certain of the benefits provided by Section 212.75, not the extension of those benefits to petitioner. Pet. App. 43a n.17, 219a n.35.

[23] Petitioner's grandiose invocation (Pet. 35-36) of the *Accardi* doctrine, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is irrelevant. Nothing in the agency's regulations provided that a completely meaningless factual hearing must be held where the producer's suggested alternative date fails as a matter of law. See also Fed. R. Civ. P. 56 (providing for summary judgment where there is no issue of material fact).

cluding a shift of "almost 20 percent of 1975 production * * * across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973." *Id.* at 229a-230a n.42. It was this substantial shift in production that allowed petitioner to claim most of its new oil even though total production from the field had not in fact increased, a result prohibited by the letter, and antithetical to the purposes, of the price control program. The agency had in fact repeatedly made crystal-clear that shifts such as those caused by petitioner at Hawkins Field rendered meaningful lease-by-lease comparisons impossible and therefore required the adoption of a unit BPCL. See, *e.g.*, *id.* at 53a; note 20, *supra.*

In short, petitioner's " 'realignment of the pattern of production would have played havoc with the federal pricing system had [the agency] permitted lease by lease property designations to continue in force after a unitization [because] [i]t would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases while other leases would be producing less or not at all.' " Pet. App. 54a (citation omitted). The underground drive mechanism of the reservoir is thus irrelevant and, in any event, too complex and amorphous to be relied upon as a workable regulatory standard. *Id.* at 54a-55a, 226a n.38.

4. Petitioner lastly takes issue (Pet. 38-41) with the amount of the judgment. Petitioner's reliance on the supposed equities in its favor is, as the court of appeals observed, for the most part "simply a recasting of its unsuccessful claim * * * that the Government was estopped from challenging the legality of lease-by-lease accounting." Pet. App. 77a. Contrary to petitioner's argument, the courts below fully considered the relevant mitigating factors; indeed, the district court, after "careful consideration of the voluminous record," declined to assess civil penalties against petitioner. *Id.* at 259a-260a.

By the same token, however, the district court refused "to excuse [petitioner's] behavior." *Id.* at 260a. As the district court noted, petitioner's pricing practices "ignor[ed] [the] unequivocal dictates of the regulations" and departed from petitioner's own construction and application of the regulations at its other units. *Ibid.* The court of appeals adopted the findings of the district court in this regard, *id.* at 77a, and they plainly warrant no further review.[24]

Petitioner's argument that its liability should have been limited to its own production from Hawkins Field was correctly rejected by TECA (Pet. App. 55a-61a) on the basis of that court's prior precedents. Moreover, this Court has recently declined to review the identical contention in *Christmann & Welborn* v. *DOE*, 773 F.2d 317 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-81 (Oct. 15, 1985); see also *Sauder* v. *DOE*, 648 F.2d 1341, 1347-1349 (Temp. Emer. Ct. App. 1981). There is no reason for a different result here.

Petitioner, which owned approximately 80% of the working interest in Hawkins Field, was the moving force behind unitization and the dominant force after unitization. Its liability rests on the fact that petitioner "caused the overcharges" throughout the unit and is therefore "fully liable for all of them." Pet. App. 55a. As sole operator of the unit, petitioner made all production and pricing decisions (*id.* at 57a (quoting district court's opinion)):

"[Petitioner] chose the wells to shut-in, the wells

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[24] Petitioner's challenge to the award of prejudgment interest rests on the same " 'considerations of fairness' " that it urges in mitigation of the award generally. Pet. 40-41 (quoting *Board of County Commissioners* v. *United States*, 308 U.S. 343, 352 (1939)). The argument was properly rejected by both courts below. Pet. App. 71a-76a, 258a-259a. Similarly, petitioner's suggestion that consumers were not injured by its overcharges (Pet. 39) ignores the fact that, "because of the nature of the Entitlements Program, and the price control regulations, the effect of [petitioner's] wrong had been spread throughout the distribution chain, to the ultimate consumers." Pet. App. 78a; see pages 28-29, *infra*.

> where production was to go up or down, where to inject gas, and how much. . . . Most important, [petitioner] decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized . . . later after Ruling 1975-15 was issued, . . . and finally when it switched to a unit BPCL under Section 212.75 in September 1976."

Thus, "[t]he undisputed evidence * * * supports the conclusion that [petitioner] is responsible for all of the overcharges." *Ibid.*[25]

TECA correctly concluded that operator liability is in accordance with the scheme established by Congress and is necessary to avoid a multiplicity of actions across the country against the almost 2500 owners of interests in Hawkins Field, which would " 'plunge the agency into an "administrative quagmire" * * * [and] effectively block enforcement of oil price controls at Hawkins Field.' " Pet. App. 57a (citations omitted). This conclusion by TECA, the court most familiar with the regulatory program at issue in this case, see *Tully* v. *Mobil Oil Corp.*, 455 U.S. at

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[25] Petitioner's argument (Pet. 39) that it cannot be held liable for overcharges attributable to Texaco's production from Hawkins Field was correctly rejected by TECA because the "uncontested facts established that [petitioner] did 'cause' th[ose] overcharges" as well as all of the others at the Hawkins Field Unit. Pet. App. 62a. Petitioner also renews in this Court (Pet. 23-24 n.22) a contention that TECA correctly ruled had not been properly preserved for appellate review (Pet. App. 66a-67a) concerning whether a small amount of the judgment had inadvertently been based on production from outside Hawkins Field. This claim apparently relates to production by a few owners whose tracts were in fact within the unit but who had not signed the unit agreement, production that in our view is properly encompassed within the judgment. In reviewing the record, we have not ascertained that any sales from tracts not within the Hawkins Field Unit were included in the judgment. In any event, petitioner's argument would have been more appropriately addressed to the lower courts through a motion to alter or amend the judgement had petitioner not already waived it.

248, is consistent with decisions of other courts of appeals in analogous contexts and warrants no further review. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *Tenneco Oil Co.* v. *FPC*, 442 F.2d 489 (5th Cir. 1971).

5. Finally, the petitioners in Nos. 85-430, 85-432, 85-440, and 85-444[26] argue that the district court abused its discretion in ordering that restitution of Exxon's overcharges be made through the several States rather than allowing consumers and direct and indirect purchasers of crude oil to attempt to prove that they suffered actual and quantifiable losses as a result of Exxon's violations. These petitioners intervened only very late in the day in the district court and offered little support there for the contentions that they now press.[27] Although for the most part they do not now detail the basis on which they are entitled to the overcharges, the remedy petitioners—which include refiners, distributors, and ultimate consumers of crude oil—offered in the court of appeals competing and

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[26] We refer to these parties as the "remedy petitioners."

[27] After the district court had taken the full case under advisement following completion of briefing and oral argument, two groups moved to intervene with respect to the remedy for Exxon's overcharges. One was a group of crude oil refiners that conceded that the remedy issue was a purely legal question capable of resolution by summary judgment on the existing record. See R. 38337. The other was a group of independent gasoline retailers that did not offer any evidence or request a hearing. See R. 38986. After entry of judgment, various other groups sought to intervene. The district court granted each application to intervene for purposes of appeal. Pet. App. 82a n.45, 130a-134a. Given the content and timing of the remedy petitioners' motions in the district court, the full consideration of their arguments by the court of appeals, and the legal nature of the question of the district court's authority to adopt the restitutionary remedy that it ordered, there is no doubt that the remedy petitioners were afforded ample opportunity to be heard. Indeed, many of their arguments should properly be considered waived in view of the proceedings in the district court.

mutually contradictory theories for why each of them has the most compelling claim to the award.

a. The district court's order represents an unexceptional exercise of its broad equitable discretion to make restitution in a workable manner consistent with the goals of the statutory and regulatory scheme. TECA affirmed on the basis of its understanding of the operation of a complex set of regulations, no longer in effect, that governed pricing decisions in the petroleum industry. The court of appeals simply upheld one possible remedy as having appropriately been adopted in this case, without mandating the same approach in future cases. Moreover, the remedy adopted by the district court has no application outside the narrow confines of the now-defunct price control program because of the special nature of the government's cause of action and the unusual operation of the regulations at issue. See, *e.g.*, *In re DOE Stripper Well Exemption Litigation*, 578 F. Supp. 586, 592-593 (D. Kan. 1983) (noting differences between public price control and private antitrust actions). Finally, DOE recently has developed a restitutionary policy and proposed legislation that would apply to overcharges recovered in other oil price control cases. See 85-444 Pet. App. B1-B10, B14, B19-B22. In view of the factbound nature of the decision below, the procedural circumstances in which it was made, and its lack of continuing importance, further review by this Court is not warranted.

b. In any event, the remedy fashioned by the district court is well within the broad scope of its remedial power " 'to do equity and to mould [its] decree to the necessities of the particular case.' " *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Under the "Entitlements Program" then in effect, refiners with proportionally greater access to lower-priced old oil were required to make cash payments to refiners with relatively less access to such oil. In this way, the regulations "spread the benefits of access

to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products." *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976); see Pet. App. 87a-88a. 247a-248a. Other regulations permitted refiners to pass through increased costs to their customers. Pet. App. 87a-89a, 249a. "As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges * * * were borne by ultimate consumers of petroleum products throughout the entire country." *Id.* at 249a (footnote omitted).[28]

It is little wonder then that both courts below found that "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." Pet. App. 250a.[29] As the court of appeals concluded, "any attempt to trace increased costs attributable to the [Hawkins Field] overcharges

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[28] Certain of the remedy petitioners argue (*e.g.*, 85-430 Pet. 23) that this conclusion is questionable in light of the decontrol of prices of certain petroleum products before 1981. The absence of a specific regulation permitting refiners to pass through increased costs for those products, however, does not mean that the additional costs were not in fact passed through, nor does it simplify the ultimate task of identifying the actual victims of Exxon's overcharges and the extent of their injury. See generally *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968) (noting difficulty of determining actual effect of price change "in the real economic world rather than an economist's hypothetical model").

[29] Indeed, it was admitted by many of the parties below that any attempt to trace the overcharges would be impossible. See Memorandum in Support of Conditional Motion of Indicated Refiners to Intervene 5, R. 38973 ("it is impossible to trace the impact of the overcharges directly to any subsequent purchasers"); Memorandum of National Freight et al. in Support of Motion to Intervene 2, R. 38547 ("it is administratively impracticable to attempt to entertain specific claims based on specific overcharges to identified customers"); Gladieux Br.

would require a full scale audit of the entire petroleum industry, and * * * any effort to do so would be futile." *Id.* at 88a. There is no basis for this Court to set aside this concurrent conclusion of both TECA and the district court.[30]

Nor is there any basis on which to disagree with TECA's

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9 ("[n]o such findings could possibly be made without an extremely time-consuming factual inquiry, one which is almost certainly beyond the capacity of any Court or administrative agency"); Marathon Br. 17 ("proving passthrough of overcharges would depend entirely on uncertain economic assumptions and impossibly complex measurements").

[30] The remedy petitioners rely on a report issued by DOE's Office of Hearings and Appeals (OHA) in another case (85-432 Pet. App. A321-A385) to argue (*e.g.*, 85-432 Pet. 13-14) that econometric modeling techniques are available that could identify within a broad range the percentages of overcharges that were absorbed by refiners. As OHA itself made clear, however (*e.g.*, 85-432 Pet. App. A343), and as DOE has reaffirmed, these figures "say [] nothing about the amount of the overcharges any particular refiner may have absorbed. * * * [S]ome refiners necessarily will have absorbed amounts less than the average while others obviously absorbed more." 85-444 Pet. App. B3 (DOE Statement of Restitutionary Policy). Thus, "any matching between the amount a particular refiner receive[d] and the amount of harm [that it] suffered * * * [would be] purely coincidental." *Id.* at B4. Moreover, "refunds based upon the econometric method developed by OHA would entail considerable administrative costs and very long delays before distribution. It could require further hearings or an individual claims procedure where innumerable direct purchasers could be given an opportunity to substantiate their individual claims. * * * The appropriateness of the burden, cost and delay of these further proceedings is problematic in view of the small percentage of the overcharges that would actually be distributed under such a method." *Id.* at B5-B6. Finally, even OHA's modeling estimates entailed "great inexactitude." *Id.* at B4; see 85-432 Pet. App. A383 (concluding that refiners as a class may have absorbed as little as 2.7% or as much as 8.1% of the overcharges). Certainly no court should be *required* to undertake the expense and delay of a claims procedure based on econometric models so inherently imprecise.

In a supplemental brief in support of their petition in No. 85-430, Marathon Petroleum Co., et al. (Marathon) attack OHA's actual report, primarily on the basis of correspondence from a Member of

conclusion that the remedy adopted by the district court is "equitable and fair, and a reasonable method of compensating the consuming public for the [Hawkins Field] overcharges." Pet. App. 91a. The district court modeled its remedy on the one adopted by Congress in the Warner Amendment, Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (85-432 Pet. App. A316-A319), with respect to restitution of other petroleum overcharges. Pet. App. 254a-256a.[31] By earmarking funds for specific energy conservation programs, the Warner Amendment was designed "to benefit the class of persons injured by [oil price control] violations." 85-432 Pet. App. A316. Congress recognized that these conservation programs benefit the public at large by reducing our dependence on foreign oil. See S. Rep. 94-1119, 94th Cong., 2d Sess. 52 (1976); see also Pet. App. 256a. The remedy in this case thus "accomplishes the intent of Congress" (Pet. App. 91a) by

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Congress concerning an earlier draft of the report that was not adopted. TECA correctly rejected Marathon's eleventh-hour attempt to interject this incompetent and irrelevant evidence into the record (85-430 Supp. Br. App. 1a), and there is no reason for this Court to do otherwise. The OHA report recently was issued in a completely separate case and was not cited by either court in this action. See Pet. App. 80a n.43. The unsubstantiated allegations on which Marathon relies therefore could not possibly affect the outcome of the instant case.

[31] Contrary to the remedy petitioners' argument (*e.g.*, No. 85-430 Pet. 19), Congress did not intend through the Warner Amendment to prohibit courts from adopting similar restitutionary remedies in other cases. See 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (remarks of Sen. Kennedy). There is neither an express nor an implied indication in the Warner Amendment that Congress intended to limit the broad remedial authority inherently possessed by the courts in cases of this kind, see *Porter* v. *Warner Holding Co.*, 328 U.S. at 398, a limit that would have been a simple matter to articulate had Congress desired to do so. Finally, the district court made it clear that it was not relying on any implication of authority in the Warner Amendment itself but only on its "broad equitable powers to order restitution." Pet. App. 256a (footnote omitted).

helping "to relieve consumers of some of the burden of towering oil costs" (*id.* at 256a), a burden that was increased by "[t]he colossal scale of Exxon's wrongdoing" (*ibid.*). As TECA concluded (*id.* at 92a (footnote omitted)):

> While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest.

There is simply no warrant for upsetting the reasoned exercise of discretion affirmed below.

c. The remedy petitioners contend, however, that the failure of the courts below to permit them to present evidence of the fact and amount of their actual injuries was inconsistent with due process and restitutionary principles. This argument is completely without merit. This case is a government enforcement action pursuant to Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. As TECA repeatedly has emphasized, "[a]ctions by the United States under ESA Section 209 are taken to enforce public, not private rights." Pet. App. 82a-83a (quotation marks and citations omitted). Section 209 does not create a cause of action on behalf of private persons who were injured by violations of the petroleum price regulations—that was provided by Congress in Section 210 of the Act, which is not at issue here. Because the remedy petitioners were not entitled to recover damages by way of restitution in this action, due process did not require that they be permitted to present evidence in support of their claims. Indeed, as the court of appeals noted, they were not even proper intervenors as of right. Pet. App. 83a (quoting *Cities Service Co.* v. *DOE,* 715 F.2d 572, 573-574 (Temp. Emer. Ct. App. 1983)). Cf. *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 689

(1961); see also, *e.g.*, *United States* v. *Automobile Manufacturers Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd *sub nom. City of New York* v. *United States*, 397 U.S. 248 (1969). The remedy petitioners thus were afforded ample, or more than ample, process by being permitted to raise their arguments below; nothing in the Due Process Clause requires that those arguments be accepted.

The cases on which the remedy petitioners rely (*e.g.*, 85-430 Pet. 12, 16) are unavailing. None of these cases establishes a protected property interest in a restitutionary fund that results from a government enforcement proceeding or otherwise requires that such a fund be distributed, whatever the administrative costs, on an individual basis to persons claiming to be the ultimate victims of illegal private activity. In *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949), for example, funds had been paid into the court of appeals pursuant to that court's stay of an administrative order reducing natural gas rates. This Court held that, to the extent possible without "prolonged litigation," the court of appeals was required to "determine who suffered a loss as a result of the court's action in granting the stay." *Id.* at 584. Nothing in the Court's opinion purports to impose a duty on courts of equity to hold proceedings to attempt to identify the ultimate victims of an overcharge (especially one not resulting from an erroneous court order) where that has reasonably been determined to be impossible. Similarly, in *Porter* v. *Warner Holding Co., supra,* the Court held only that federal courts possess inherent equitable authority to order that a landlord's overcharges, which violated the Emergency Price Control Act of 1942, be restored to its tenants. The Court did not undertake to limit that equitable authority in the manner for which the remedy petitioners contend.

In sum, the restitutionary remedy under Section 209 is a government enforcement mechanism whose "central purpose * * * is to determine the amount by which the wrong-

doer has been unjustly enriched, and then to make him disgorge that amount." *Citronelle-Mobile Gathering, Inc.* v. *Edwards,* 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982).[32] Section 209 "is not designed to provide redress for a victim who has suffered an injury because of a violation of a [price control] regulation." *Bulzan* v. *Atlantic Richfield Co.,* 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980). If compensation results, it is only as a "by-product of the agency's effort to reestablish compliance with its regulatory scheme." *Ibid.* Accordingly, Section 209, which evinces no intention "to limit the power of the courts or the agency * * * to a particularly strict interpretation of restitution," *Sauder* v. *DOE,* 648 F.2d at 1348, neither establishes in private persons an entitlement to disgorged funds nor requires a wasteful and ultimately futile attempt to determine the extent to which various persons or groups of persons were injured. While the district court was not compelled to shape the remedy precisely as it did, it acted well within its discretion by patterning the remedy after one established by Congress and directing that the funds be used in a manner that will help to undo the damage caused by the regulatory violations in this case.

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[32] TECA carefully distinguished the factual circumstances presented here from those in *Citronelle-Mobile,* which, it observed, involved only a single refiner, a single product, and identifiable customers. See Pet. App. 85a-87a. Even if the remedy petitioners were correct in contending (*e.g.,* 85-432 Pet. 24) that there is a conflict between that case and this one, the existence of such an intra-circuit conflict, which TECA is well able to resolve in the future, would be an argument against, not for, review here. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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* The Solicitor General is disqualified in these cases.

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No. 85-440

In the Supreme Court of the United States

OCTOBER TERM, 1985

PHILADELPHIA ELECTRIC COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

REPLY MEMORANDUM OF PHILADELPHIA ELECTRIC COMPANY IN SUPPORT OF PETITION FOR *A WRIT OF CERTIORARI*

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TABLE OF CONTENTS

Page

REASONS FOR GRANTING THE PETITION

POINT I 2
POINT II 3
POINT III 6

CONCLUSION 8

Appendix A A-1

Appendix B B-1

TABLE OF AUTHORITIES

Page

Cases:

Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717 (TECA) *cert. denied*, 459 U.S. 877 (1982) 3, 4

City of Philadelphia, et al. v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971) 4

In re DOE/Stripper Well Exemption Litigation, MDL 378 (D. Kan.) 4, 5

In re Folding Carton Antitrust Litigation, 1984-2 Trade Cas. ¶66,189 (7th Cir. 1984) 7

Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-29 (1982) 3

Matthews v. Eldridge, 424 U.S. 319 (1976) 2

Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1970) 2, 7

Standard Oil Co./Indiana (Amoco) 10 DOE ¶85,048 (1982) 5

State of Tennessee v. Dole, 749 F.2d 331 (6th Cir. 1984) 2

Van Gemert v. Boeing Co., 739 F.2d 730 (2d Cir. 1984) 7

Miscellaneous:

Brief of the United States 2, 3, 4, 6

EIA, October 1984 Monthly Energy Review at 77 (January 1985) 6

PECO Petition, No. 85-440, at 7 n.2 7

States' Brief 2, 3

Sup. Ct. Rule 17 2

Supplemental Brief of Marathon, et al., No. 85-430 6

In the Supreme Court of the United States

OCTOBER TERM, 1985

PHILADELPHIA ELECTRIC COMPANY,

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v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

REPLY MEMORANDUM OF PHILADELPHIA ELECTRIC COMPANY IN SUPPORT OF PETITION FOR *A WRIT OF CERTIORARI*

Philadelphia Electric Company ("PECO"), an investor owned public utility which was directly harmed by Exxon Corporation's ("Exxon") overcharges, files this Reply Memorandum to respond to the briefs filed by the United States and the "State Respondents" (collectively referred to as "the opposition") in opposition to the petitions.[1]

1. In addition to PECO, oil refiners, airlines, gasoline retailers, oil jobbers, truck operators, taxicab operators and motorists have petitioned this Court to review the decision of the District Court which authorizes diversion of the entire restitution fund (now estimated to be approximately $2 billion) to a small segment of the population. Nos. 85-430, 85-432 and 85-444.

The gross errors of law committed by the District Court as well as its departure from the accepted and usual course of judicial proceedings and the conflict between TECA and the Sixth and Eighth Circuits[2] makes review by this Court imperative. *See* Sup. Ct. Rule 17. Three points are made in Reply. First, the opposition misstates the record concerning PECO's intervention in the District Court. Second, the lower court's findings, stated and restated by the opposition, are hopelessly inconsistent and will be a dangerous precedent unless corrected by this Court. Finally, this case is of major significance both in the ongoing litigation under the price control regulations and in other bodies of law where restitutionary rights are implicated.

REASONS FOR GRANTING THE PETITION

POINT I

The opposition simply mischaracterizes the record when it contends that PECO never sought to present its claim to a portion of the restitutionary fund to the District Court. *See* States' Brief, at 25; United States' Brief, at 27. In its Motion to Intervene in the trial court, PECO alleged that it sought to intervene "to assert and protect [its] right to recover for overcharges of oil. . . ." *See* Appendix A hereto, at A-1. PECO alleged further that its "ability to protect [its] interests in the fund either in *this Court* [the district court] or on appeal . . ." would be impaired unless intervention was granted. *See id.* at A-2 (emphasis supplied). The District Court, not PECO, limited PECO's intervention to "purposes of appeal." The oppositions' arguments to the contrary are not supported by the record and must be rejected

Indeed, the District Court's curtailment of PECO's right to present its claim in a meaningful way is a significant factor in the denial of PECO's right to due process. *Matthews v.*

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2. *Compare* the decision of the Court below, 773 F.2d 1240 (Exxon App. at 1a-172a) *with Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970) and *State of Tennessee v. Dole*, 749 F.2d 331 (6th Cir. 1984).

Eldridge, 424 U.S. 319 (1976). In its motion to intervene, notice of appeal, brief on appeal and petition in this Court, PECO has consistently sought the opportunity to be heard to protect its restitutionary rights. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982); *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA) *cert. denied*, 459 U.S. 877 (1982). At each juncture it has been met with the argument that "it is impossible" for PECO to prove its claim—yet it has never been given the opportunity to do so in this proceeding. In sum, the Courts below and the opposition rely on the circular argument that PECO should not be permitted to make a claim because they have already determined that the claim will be unsuccessful.

POINT II

The District Court's decision to disburse the restitutionary funds for use in five limited programs constitutes an error of law and a departure from accepted standards of judicial procedure. The opposition contends that the petition should be denied because the Courts below have correctly held (1) that it is "impossible" to trace the victims of Exxon's massive overcharge, (2) that the ultimate consumers of oil were harmed, and (3) the injured consumers of oil will, in fact, be the beneficiaries of the state distributions. *See* States' Brief, at 12, 13 & 15; United States' Brief, at 29-31. This reasoning is hopelessly contradictory, and impossible to substantiate on this record. The more that the opposition repeats these "findings" the more evident is the miscarriage of justice in this case.

First, the District Court's finding that "Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims" (United States' Brief, at 29 *quoting* the District Court) cannot be harmonized with the finding that the overcharges were "borne by consumers of petroleum products." (States' Brief, at 7, *quoting* the District Court). If it is impossible to trace the victims of the overcharge, as the op-

position contends, it cannot also be determined that ultimate consumers were harmed by the overcharge.[3]

The reasoning of the District Court and the opposition has another fundamental flaw. If the Courts below are correct that the oil consuming public was harmed, the remedy they chose does not compensate the oil consumers. Rather, it diverts the overcharges to a small segment of the population and to the exclusion of injured utilities, truck operators, taxicab operators and others, all of whom can and should be compensated, if, in fact, consumers were harmed. *See City of Philadelphia, et al. v. American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971). In short, the irreconcilable "findings" and conclusions of the District Court must be corrected before they serve to justify diversion of other restitutionary funds from injured victims, to the Treasury, or the States, for use in narrow social programs.

It is now apparent that the District Court's fundamental assumption of the "impossibility" of tracing the harm—made without affording claimants any opportunity to present evidence or argument—is clearly erroneous and should not be left standing. Upon this assumption the opposition builds its entire argument against granting the Petitions. *See*, Brief of the United States, at 33-34 (an "attempt to identify the . . . victims of an overcharge . . . has reasonably been determined to be impossible") (an attempt to identify the victims would be "wasteful and ultimately futile"). Once the fallacy of this position is exposed, the opposition's argument collapses like the proverbial house of cards. The States and the United States rely on carefully edited portions of the Report of the Office of Hearings and Appeals filed in *In re DOE/Stripper Well Exemption Litigation*, MDL 378 (D. Kan.). An earlier version of the Report (the "Earlier Report") unedited by policymakers at

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3. If it is ultimately determined that no victim of the overcharge can be identified, distribution to the States or the Treasury would still be improper. As Judge Pointer noted in *Citronelle-Mobile Gathering, Inc. v. Edwards, supra*, if it is not possible to ascertain the victims of the overcharge, then the fund should be returned to the offending party. 669 F.2d, at 727 (Pointer, J. concurring in part and dissenting in part).

the Department of Energy who seek to obtain all crude oil overcharge funds for the United States Treasury, and until recently withheld from the parties to that litigation and the public,[4] makes it clear that victims of the overcharges can be readily ascertained. The findings in the Earlier Report are consistent with a long line of decisions by the Office of Hearings and Appeals finding that it is possible to trace overcharges and awarding restitution funds to consumer claimants in oil product cases. *See, e.g., Standard Oil Co./Indiana (Amoco)*, 10 DOE ¶85,048 (1982). Not until this case, and the adoption of a policy by the Department of Energy to use restitution funds for general Treasury receipts, has the government asserted that true restitution is "impossible" in overcharge cases.

The Earlier Report makes the following findings concerning utilities, such as PECO.

> For consumers of petroleum products who purchased directly from a refiner, including airlines, *public utilities*, the federal government, and other large purchasers that used petroleum products in their businesses, *the finding in this determination that refiners absorbed four percent of the impact of the MDL 378 overcharges means that the rest of the MDL 378 overcharges were passed through, and those consumers absorbed the remainder, or 96 percent of that impact.* Consequently,

4. The earlier version of the OHA Report, dated April 1, 1985 has been lodged by the petitioning refiners in No. 85-430 with the Clerk of this Court. The Report was ordered produced to the parties in the *Stripper Well Litigation* on the Motion of PECO and certain refiners and over the objection of the government that it was a privileged "draft." *See* Appendix B hereto. All of the petitioning consumers in this action—PECO, the Air Transport Association, the National Oil Jobbers Counsel, the gasoline retailers, National Freight, Inc., RJG Cab Co., Inc. and Sweeney are also parties in the *Stripper Well Litigation*. Pursuant to Judge Theis's referral to the office of Hearings and Appeals (OHA) of the question of who bore the overcharge, they presented evidence in support of their claims before the OHA. The Earlier Report recommends a claims procedure to make restitution to utilities and others. *See In re DOE/Stripper Well Exemption Litigation*, 578 F. Supp. at 595 (D. Kan. 1983).

> any refund mechanism adopted as a result of this fact-finding should permit consumers that purchased directly from refiners to file refund claims immediately . . . Consumers that file refund claims would need to demonstrate only the total amount of purchases made directly from a refiner during the three-year period 1978 by multiplying qualifying purchases by $0.001 . . . *[P]ublic utilities purchased approximately 66,332,700,000 gallons of product during the 1978-80 period.* EIA October 1984 Monthly Energy Review at 77 (January 1985). *This level of purchases would entitle the utilities to refunds totalling $66.3 million. . . .*" (emphasis supplied) (Earlier Report, at 84-86)

Even though the government's efforts to keep the Earlier Report—which completely undermines its "impossibility" argument—secret have failed, it persists in relying on the edited version to attempt to justify diversion of this, and over five billion dollars of other ESA restitution funds from injured consumers to the Treasury.

The facts surrounding the disclosure of the Earlier OHA Report, documented in the Supplemental Brief of Marathon, et al., No. 85-430, render the government's argument that it is impossible to trace the overcharge incredible.

POINT III

The opposition argues that the petitions should be denied because this case arises under a "now defunct price control program." Brief of the United States, at 28. The issues presented in this case are neither limited in application nor passe. Rather, the duties of the Courts in effecting restitution under the ESA, and the procedural rights of claimants to the nearly seven billion dollars of crude oil overcharge funds already created are important and vital issues, with far reaching application. While the regulations which gave rise to these funds have been phased out, little or no progress has been made toward fulfilling the restitutionary obligations attendant to the creation of the overcharge funds.

In its initial brief, PECO cited some of the numerous pending crude oil overcharge cases upon which the decisions in this case will have a profound effect.[5] Moreover, actions are still being brought by the Department of Energy under the regulations which will lead, in the future, to the collection of additional billions of dollars in overcharge funds. For example, on October 4, 1985, the Department issued a proposed remedial order ("pro") against Atlantic Richfield Company. This one pro involves approximately $500 million dollars. The case *sub judice* will be controlling precedent in all of these cases. The opposition's strategy is obvious—to convince this Court that the matter is not important enough to be reviewed and then to use the decisions of the Courts below as precedent to obtain all of the oil overcharge funds for the government to help balance the budget, to the exclusion of those who can, and have shown that they were harmed by crude oil overcharges.

It is therefore vital to the rights of all consumers entitled to restitution under the ESA that the Petitions for a Writ of Certiorari be granted.

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5. *See* PECO Petition, No. 85-440, at 7 n.2. In addition, the questions raised in this case apply to, *inter alia*, rate cases, and class action antitrust and securities cases where unclaimed portions of settlement funds remain after an initial distribution. *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970); *Van Gemert v. Boeing Co.*, 739 F.2d 730 (2d Cir. 1984); *In re Folding Carton Antitrust Litigation*, 1984-2 Trade Cas. ¶66,189 (7th Cir. 1984).

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition for a Writ of Certiorari, PECO respectfully requests the Court to grant its Petition.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,*	:	
v.	:	
EXXON CORPORATION, *Defendant.*	:	CIVIL ACTION NO. 78-1035
PHILADELPHIA ELECTRIC COMPANY, *Intervenor.*	:	

MOTION OF PHILADELPHIA ELECTRIC COMPANY FOR INTERVENTION

Philadelphia Electric Company (hereinafter "PECO"), pursuant to Rule 24 of the Federal Rules of Civil Procedure hereby petitions your Honorable Court for leave to intervene herein on its own behalf and as a representative party pursuant to Rule 23 of the Federal Rules of Civil Procedure, and in support of this Petition, avers as follows:

1. PECO, and the class it represents, seek to intervene to assert and protect their right to recover for overcharges of oil and oil products by defendant and other oil producers.

2. PECO is an investor-owned public utility corporation, organized under the laws of Pennsylvania, supplying electricity, gas and steam heat to consumers in Pennsylvania and Maryland.

3. PECO, and the class it represents, purchased oil and oil products from defendant Exxon Corporation and other refiners during the period January 1, 1975, through January 28, 1981, in their business of supplying electricity, gas and steam heat to their consumer customers.

4. The Department of Energy (hereinafter "DOE") brought suit against Exxon Corporation, alleging pricing practices in violation of 10 C.F.R. §212.72, in that defendant

treated the Hawkins Field Unit as a single "property", beginning in January, 1975. On August 22, 1982, the DOE filed a Motion for Summary Judgment against Exxon Corporation.

5. In a Memorandum Opinion filed March 25, 1983, this Honorable Court determined that Exxon had indeed violated the Unit Property Rule and federal regulations and overcharged its customers and those of other refiners more than $895 million plus interest. The unlawful excess price of crude oil sold by domestic refiners as a result of Exxon's Hawkins Field Unit prices and the operation of the "pass through" provision of the Entitlements Program caused unlawful increases in the cost of oil and oil products purchased by PECO and the class.

6. Due to Exxon's violation of the Unit Property Rule beginning in January, 1975, PECO and the class have been directly, significantly and substantially harmed, and are entitled to recover that portion of the overcharge attributable to their purchases.

7. The DOE relinquished its responsibility under Sections 209 and 210 of the Economic Stabilization Act to secure restitution for the injured parties and instead asked the Court to order payment of any funds recovered from defendant to the United States Treasury. In the Memorandum Opinion filed March 25, 1983, this Honorable Court granted DOE's request to have the funds paid to the United States Treasury.

8. PECO and the class are direct purchasers of oil, as set forth above, and have a direct and substantial interest in the overcharge fund as determined by this Court.

9. PECO and the class are situated so that disposition of this action may, as a practical matter, impair and impede their ability to protect their interests in the fund either in this Court or on appeal to the Temporary Emergency Court of Appeal, unless they are granted leave to intervene. PECO's interests are not adequately represented by the DOE or any other existing party to the litigation.

10. PECO is entitled to intervene in this action as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, PECO is entitled to intervene

pursuant to Rule 24(b) of the Federal Rules of Civil Procedure on the ground that its claim and the main action have questions of law and fact in common.

11. PECO incorporates by reference the attached Memorandum of Law as fully as if set forth herein.

DATED: May 10, 1983

Respectfully submitted,

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: THE DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION	))))	M.D.L. 378

OPINION AND ORDER

Currently before the Court are the following motions: the refiner-plaintiffs' motion to compel production of documents; Philadelphia Electric Company's ("PECO's") motion to compel production of documents; and the Department of Energy's ("DOE's") motion for a protective order. The Court will consider the first two motions in tandem.

The refiner-plaintiffs have moved to compel the production of two documents: the original Office of Hearing and Appeals ("OHA") report dated April 1, 1985 (document P-1) and the Lorenz Memorandum (document P-2). In addition, PECO has moved for production of the following documents: drafts of a letter by the Administrator of the Economic Regulatory Administration to Congressman John Dingell (documents P-3A, P-3B, P-3C and P-3D); drafts of a letter from the Secretary of Energy, John Herrington, to Governor George Wallace (documents P-4A, P-4B, P-4C, P-4D, P-4E and P-4F); drafts of a letter from John Herrington to Congressman Dingell (documents P-5A, P-5B, P-5C and P-5D); a letter from the ERA Administrator to Theodore Garrish, General Counsel for the DOE (document P-6); a preliminary draft of a decision and order by the OHA announcing a date for a hearing and the procedure to be used to receive evidence on the matter referred to the DOE by this Court (document P-7); copies of correspondence by various DOE officials to Congressman Dingell (documents P-8A, P-8B, P-8C, P-8D, P-8E, P-8F, P-8G, P-8H, P-8I and P-8J); and a memorandum from Herrington to the ERA Administrator (document P-9). The above documents

were submitted for *in camera* inspection, and the Court has carefully examined the documents and is prepared to rule on their discoverability.

With respect to the first two documents, the draft OHA report and the memorandum from Milton Lorenz, Special Counsel for the DOE's Economic Regulatory Administration, to George Breznay, Director of the OHA, the DOE contends that the documents are protected by the deliberative process privilege. In an earlier opinion in the instant case, this Court set forth the general rules regarding the predecisional or deliberative process privilege:

> The privilege for official information is narrow. *Kincy v. Mitchell*, 67 F.R.D. 1, 14 (S.D. N.Y. 1975). The privilege does not attach to purely factual matter. *Jabara v. Kelley*, 75 F.R.D. 475, 495 (E.D. Mich. 1977). The privilege is intended to exempt from scrutiny "advisory opinions and recommendations submitted for consideration in the performance of decision and policy-making functions." *Freeman v. Seligson*, 405 F.2d 1326, 1339 (D.C. Cir. 1968). The privilege is based on the need to encourage candor in exchanges of views within the executive branch. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-25 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (1967), *cert. denied*, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967). "[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decision-making process." *United States v. Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The privilege is not absolute, however. The privilege is "qualified" or "conditional." *Kincy v. Mitchell*, *supra*, 67 F.R.D. at 11; *Wood v. Breier*, 54 F.R.D. 7, 12 (E.D. Wis. 1972). The policies which support the upholding of the privilege must be balanced by the obligation of this Court to do justice and the belief, as embodied in the federal discovery rules, that full disclosure leads more frequently to just ends. Any claim of privilege should be

> carefully scrutinized, "for by invoking the privilege the case before the court may become a mockery with 'half-informed litigants who sometimes get justice, if at all, by accident' . . ." *Wood v. Breier, supra*, 54 F.R.D. at 11, quoting, *Timken Roller Bearing Co. v. United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964). The resolution of these competing policies has been obtained by balancing, on an ad hoc basis, the individual need for the materials against the harm caused by their disclosure. Wright and Miller, Fed. Prac. and Proc. § 2019. Disclosure may be ordered after a determination that release of the material would not be injurious to the consultative functions of government. *Kaiser Aluminum & Chemical Corporation v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958); *Olson Rug Company v. N.L.R.B.*, 291 F.2d 655, 661 (7th Cir. 1961).

Dk. no. 79, pp. 11-12.

The DOE contends that the first draft of the OHA report is protected because it contains the personal opinion of the writers rather than the policy of the agency. To the extent that agency employees are inevitably the ones to prepare any sort of report, this alone cannot create a claim of deliberative process privilege or else all agency paperwork would be protected. Next, the DOE argues that the report is a draft, which, by its very nature is predecisional and deliberative. *See Exxon Corp. v. Department of Energy*, 585 F. Supp. 690 (D.D.C. 1983). Refiner-plaintiffs respond that the draft would have been the final report, and therefore outside the scope of the privilege, had the DOE not interfered with the OHA process. In a previous order, this Court held that while "consultation by the OHA with senior policy makers of the DOE would be appropriate," the Court "did not intend to allow the DOE to make the policy decisions on whether such an attempt at tracing is feasible or how to actually make restitution . . ." *In Re Department of Energy Stripper Well Exemption Litigation*, 608 F. Supp. 1104, 1107, 1108 (D. Kan. 1985). In light of this Court's previous ruling, the Court finds that the refiner-plain-

tiffs' charge of undue influence is serious. Indeed, Congressman Dingell, who reviewed both the original and the final reports, commented in strong language:

> OHA had been beaten into submission by the [DOE's] "internal" [review] process ... Its draft report was not liked by the DOE officials. This was understood by OHA and it was re-written to be a more bland report with a fact finding more to the DOE's liking.

Dk. no 681, Exh. A.

The Court is not persuaded that the release of the original report would inhibit agency personnel from expressing their views in the future, as the DOE claims. The present set of circumstances differs from other cases in which the deliberative process privilege has been successfully claimed, *see, e.g., Burke Energy Corp. v. Department of Energy,* 583 F. Supp. 507 (D. Kan. 1984), in that the OHA in this case operated virtually in the capacity of a special master to this Court. This Court referred to the OHA "only the factual question concerning the particularized impact of the overcharges ... The Court, not the DOE, will decide where the funds go." *In re Department of Energy Stripper Well Exemption Litigation,* 578 F. Supp. 586, 596 (D. Kan. 1983). Thus, the draft document does not reflect the policy of the agency in the sense that the deliberative process was intended to protect. *See Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980). Therefore, the Court holds that the reasons for the deliberative process privilege do not apply with respect to the original OHA draft, and whatever interests remain are outweighed by the need for disclosure.

The Lorenz Memorandum is claimed by the DOE to be protected by the predecisional and investigative privileges. On August 31, 1984, George Breznay, OHA Director, wrote a memo to Rayburn Hanzlik, ERA Administrator, seeking factual information about computer capabilities to assess overcharges. This memo was placed in the administrative record. On September 19, 1984, Milton Lorenz, ERA Special Counsel, responded regarding "ERA Capability for Calculating Re-

finer Overcharges on a Transactional Basis." The substance of the Lorenz Memorandum was deleted from the administrative record.

The DOE contends that the Memorandum contains Lorenz' personal views regarding the use of computer programs. The Court explained above the circularity of this type of argument. Moreover, the Court has carefully examined the Lorenz Memorandum and found that it is not the sort of document that "is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency." *Coastal States Gas Corp.*, 617 F.2d at 866.

In addition, the DOE claims that the investigative privilege applies to the memorandum, since the document discloses in general terms the techniques employed by the ERA in fulfillment of its law enforcement objectives. The investigatory privilege generally protects against "the public disclosure" of material that might "harm law enforcement efforts." *United States v. Winner,* 641 F.2d 825, 831 (10th Cir. 1981). The DOE suggests that the law enforcement efforts which would be hampered are some refiner-pricing cases currently being prosecuted by the ERA. The Court has reviewed the Lorenz Memorandum and finds that any references to investigative techniques are so obvious that they are certainly already known by those subject to prosecution. Since the Lorenz Memorandum is a response to a specific request for factual information and because the concerns the Court had with regard to the original OHA report apply with equal force here, the Court shall order the production of the Lorenz Memorandum.

Regarding the remainder of the documents requested to be produced (P-3 through P-9), the Court finds that production is unnecessary in light of the Court's above ruling disclosing the substantive documents, P-1 and P-2. Moreover, documents P-3 through P-9 do involve the transmission of more personal thoughts. Finally, the Court's examination of these documents convinces it that the documents contain no rele-

vant information not already discoverable through the original OHA report and the Lorenz Memorandum.

The Court now turns to the DOE's motion for a protective order. On September 24, 1985, this Court signed a temporary protective order serving "to bar the deposition testimony of present and former DOE employees and quash the subpoenas served until such time as PECO has convinced the Court it should lift the protective order." Dk. no. 671, p. 2. PECO has noticed the depositions of the following groups of people: the custodians of records of the DOE and OHA; the OHA adjudicators; certain DOE officials, such as John Herrington, the Secretary of Energy; and DOE litigators, Thomas Newkirk, Larry Ellsworth and Marcia Sowles. The Court agrees with the DOE that this effort to probe the minds of government officials and personnel is barred by the deliberative process privilege. The Court has already rejected PECO's request that all consultations between OHA and DOE be made on the record. *Stripper Well Exemption Litigation*, 608 F. Supp. at 1107. More importantly, internal agency discussions are just the type of "honest and frank communication" likely to be stifled if the parties are subject to searching cross-examination. *Coastal States Gas Corp.*, 617 F.2d at 866. None of the cases cited by PECO supports the sort of interrogatory rummaging that PECO wishes to conduct. Therefore, the Court shall not lift the protective order entered on behalf of the DOE.

IT IS THEREFORE ORDERED that the DOE's motion for a protective order is hereby granted.

IT IS FURTHER ORDERED that the refiner-plaintiffs' and PECO's motion to compel production of documents P-1 and P-2, the original OHA report and the Lorenz Memorandum, is hereby granted. These documents shall be released two weeks from the date of this Order.

IT IS FURTHER ORDERED that PECO's motion for the production of documents P-3 through P-9 is hereby denied.

At Wichita, Kansas, on this *26th* day of *November*, 1985.

/s/ _____
United States District Judge